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A TREATISE

ON

THE LAW

OF

ADULTERINE BASTARDY,

WITH A

REPORT OF THE BANBURY CASE,

AND OF

LL OTHER CASES BEARING UPON THE SUBJECT.

By SIR HARRIS NICOLAS, K.C.M.G.

BARRISTER AT LAW.

LONDON:

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MDCCCXXXVI.

TO THE

RIGHT HONOURABLE

CHARLES BARON COTTENHAM,

LORD HIGH CHANCELLOR

OF

GREAT BRITAIN,

&c. &c. &c.

THIS TREATISE

IS, WITH HIS LORDSHIP'S PERMISSION,

RESPECTFULLY DEDICATED.

PREFACE.

The following Treatise is the first attempt which has been made to collect all the Authorities and Decisions on the Law of Legitimacy in this country, and to deduce from them the history and present state of the Law on that important subject. Until the appearance of the "Report of the Proceedings on the Claim to the Barony of Gardner," by Mr. Le Marchant, the matter had been entirely neglected, and though that able work is highly valuable for the light which it throws on the particular question to which it relates, (the period of gestation), as well as for many interesting cases which are there printed from manuscripts, it does not profess to be a Treatise on the Law of Adulterine Bastardy.

The Author of this volume deceives himself, if a perusal of it will not convince the Profession of two facts, either of which would justify its publication; first, that the Law has undergone im-

portant changes, in consequence of a *mistaken* view having been taken of previous authorities; and secondly, that there are not sufficient grounds for the opinions which now prevail respecting the Law on the subject.

It is, he submits, indisputable that the earliest recorded case[1] has been misunderstood; that the abandonment of the ancient maxim of the "quatuor maria" was caused by a supposed dictum of Lord Chief Justice Hale, which, there are strong reasons for believing, he never pronounced; and that the second and most important innovation which was made in the Law, (the Banbury decision, in 1813), was founded upon an idea which has, it is confidently presumed, been disproved, namely, that the Law as it is laid down by Lord Coke, "was not the Law of England."

This work is confined to the Law of this country on the *status* of children born in wedlock; and the plan has been to insert, in chronological order, and as nearly as possible in the words of the original, *every authority* and *every case* that in any way bears upon the question; together with such observations as arose out of them. Besides all printed cases, some inedited ones will be found; and the Author is not aware of a single omission, or, what is equally material, of any addition or suppression having been made, which could give a particular construction to the

[1] *Foxcroft*'s case.

extracts from the Year Books, Reports, or other works referred to.

His sole object was to ascertain, from a careful examination of cases and authorities, what the Law of Adulterine Bastardy actually was and is; and he has stated the conscientious conviction of his own mind, after a laborious investigation, although his opinions may appear at variance with those of some of the highest modern authorities. Having no theory of his own to support, and finding that the soundness of the definition of the most learned lawyer whom this country has produced, had been impeached, the inquiry after the *truth* became no less interesting as a matter of historical curiosity, than important as a point of professional knowledge.

The great importance of the Banbury case, which is generally supposed to have produced a total change in the Law of Legitimacy, has caused a large part of the volume to be appropriated to it; and whilst every fact is carefully stated, comments are made, with the view of showing that the circumstances which were most relied upon by Lords Eldon, Ellenborough, and Redesdale, as evidence of the illegitimacy of the petitioner's ancestor, are susceptible of a different construction; and that all of them might have occurred, and the children have nevertheless been the real issue of their ostensible father.

If it be said that an *ex parte* view is here taken of those facts, it must be remembered that a no less *ex parte*, though contrary, statement of them will be found in the speeches of the noble persons who induced the House of Lords to reject the claim; and those speeches are more than sufficient to counterbalance any undue effect which so humble a person as himself is capable of creating.

Of his own opinions on the Law on the subject it would ill become him to speak in so prominent a part of the volume, were it not that his labours have convinced him, not only of the correctness of Lord Coke's exposition, but of the sound policy of the Law, after it became so far modified as to abandon the rule of the "quatuor maria," while it required evidence of the *absolute impossibility* of the husband's being the father of his wife's child, *from whatever cause* that *impossibility might arise*, instead of making the impossibility depend solely upon corporeal infirmity, or geographical limits.

He is far from being convinced of the legal justice of the decision in the Banbury case; and he humbly conceives, that if the spirit of that decision be established as Law, no uniform principle on such questions can possibly be maintained; that Judges will give conflicting opinions, and Juries return contradictory verdicts; and thus a point of Law, which, for the sake of

social order, the peace of families, and the interests of morality, ought to be clear, certain, positive, intelligible, and defined, will be left in a state of perilous uncertainty, and made to depend, *not* upon matters of *fact*, but upon mere *inferences* and *opinions*.

The Author is deeply sensible that his opinions, and still more, the remarks which he has made upon the judgments of the learned persons who decided the Banbury case, may expose him to the charge of presumption. In profound respect for the talents, learning, and integrity of those eminent individuals, he does not yield even to the most ardent of their admirers. But that question was one of *fact* and *Law*, and the possibility of error on points of *fact* and *Law* is frequently shown by applications for new trials, upon grounds of the misdirection of Judges on either or both. That many *facts* in the Banbury case were misunderstood, whilst others of considerable moment have since been discovered, cannot be denied; and it may be presumed, that in acting upon the supposition that Lord Coke's definition of the *Law* was *erroneous*, a mistake was committed, which proved fatal to the legal merits of the claim.

In doubting the soundness of the principles upon which the Banbury judgment was founded, and in expressing apprehension that if that precedent were to be adopted, it would lead to most

serious results, the Author is fortified, by the opinions of some of the most distinguished lawyers of the day, and by the entire body of authorities from the earliest period. The propriety of the judgment of the House of Lords on the Banbury claim must depend upon those authorities, which are now for the first time collected; and it may also be said, that all the *facts* of the case itself have never before been fully stated. The Profession will therefore be enabled to form their own conclusions; and the well known case of *Morris* and *Davis*, which has been the subject of *three trials*, of a judgment of the Lord Chancellor, to avoid the expense of a *fourth* trial, and which is now, it is said, to be brought before the House of Lords on *appeal*, affords the strongest proofs of the danger of departing from those "plain and sensible rules" of Law on this subject, which are alike sanctioned by the experience of ages, and by the approbation of the most profound jurists of all countries.

It only remains that the Author should observe how much he has been indebted to Mr. Le Marchant's Report of the Gardner case, from the Appendix to which he has taken the liberty of reprinting the speeches of Lords Eldon, Ellenborough, Redesdale, and Erskine, together with those of the Counsel on the Banbury claim, as well as the important cases of *Routledge* and *Carruthers*, and *Smyth* and *Chamberlayne*. The

complete manner in which one particular branch of the Law of Legitimacy is there illustrated has rendered it unnecessary to do more than incidentally advert to it in this volume.

Torrington-square,
6th February 1836.

ERRATA AND ADDENDA.

P. 33, line 6, *del.* the inverted commas.

P. 39, line 24, *for* " dare to take a demurrer" *read* " dare to demur."

P. 45, line 34, *for* " Y. B. 41 Edw. III." *read* " Y. B. 43 Edw. III."

P. 53, line 23, *for* " Hen. VI." *read* " Hen. IV."

P, 107, line 26, *for* " to pronounce" *read* " to have pronounced."

P. 125, line 17, *for* " has" *read* " had."

P. 144, line 1, *for* " plaintiff" *read* " defendant."

P. 216, line 11, *for* " The last case" *read* " Nearly the last case."

P. 241, 242, in the marginal note *del.* " Third Trial, 1828," and *read* " February 1830."

P. 395, line 20, *for* " admit" *read* " admits."

P. 473, line 31, note, *for* " carries it with its own" *read* " carries with it its own."

P. 490, line 31, *for* " violating" *read* " violation."

Note.—P. 132, line 2 and 3. The case to which Sir William Wynne alluded must have been that of *Pendrell* v. *Pendrell,* and not of *Rex* v. *Reading*. *See* Buller's Nisi Prius, by Bridgman ; 7th edition, p. 113 [a].

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IT is unnecessary to commence the following observations on the LAW of ADULTERINE BASTARDY in England, with an inquiry into the principles of the Civil or Roman Law; because the Civil Law on that subject always differed materially from the Common Law of this country.

The Common Law, however, adopted as a fundamental principle, the maxim of civilians, that *marriage* is the *proof* of *paternity*. "Pater est quem nuptiæ demonstrant," is equally the language of the Digest and of the English Law; but the latter did not permit the presumption of legitimacy to be rebutted by circumstances which, in the opinion of some jurists, were sufficient for that purpose. It marked, with great precision, the only possible grounds upon which the paternity of a child, born in wedlock, could be impeached; and it adhered for many centuries, with singular tenacity, to the rule which it prescribed.

Much has been said, and by men whose sentiments are entitled to respect, of the absurdity and injustice which have attended the rigid application of that rule of law which fixed upon an injured husband the burthen of supporting a spurious progeny; and the claims of the real heirs, whose succession to the family inheritance has been thereby impeded, have been urged with great cogency and eloquence. These appeals have been addressed to the feelings; and in defence of moral justice against supposed fraud, and imposture, the mind is easily excited.

Although the Common Law, in its anxiety to maintain the rights which marriage confers upon children born under its sanction, may in some instances have produced injustice, it should be remembered that isolated cases are no proof of the value of any law; for, to use the words of Lord Coke, "It is better, saith the law, to suffer a mischief to one, than an inconvenience that may prejudice many[1]." The Law cannot, and does not, provide for every contingency which may occur. It looks only to the usual habits and accidents of life; and being founded upon the philosophic principle of promoting the good of society at large, it must, from the very nature of human affairs, be sometimes attended with injustice to individuals. No man with the slightest powers of reflection, can fail to perceive that the law which presumes that the husband is the father of a child born of his wife, tends to promote public morals and female chastity; and consequently, in an immense majority of cases, to render the *de facto*, consistent with the *de jure*, paternity. It would be a waste of words to defend a principle which has prevailed for ages, with greater or less modification, throughout Europe; and though it may occasionally have led to hardship, or moral wrong, those instances are overwhelmed in the torrent of good which it has accomplished.

The Canon or Ecclesiastical Law, which was usually called by early English lawyers "the Law of Holy Church," though founded upon the Civil Law, was at variance both with the Civil and the Common Law with respect to Adulterine Bastardy, for it looked only to the *actual* paternity. All evidence which related to that fact was admissible; and instead of considering that the marriage demonstrated who was the father of the

[1] 1 Inst. 97 b.

child, the canonists seem rather to have preferred the presumption of illegitimacy to that of legitimacy. From the great influence and learning of the church, the Canon Law prevailed generally throughout Europe; but in England a distinction was drawn at a very early period between the "Law of the Land" and the "Law of Holy Church;" and it appears to have always been a point of national pride to preserve that distinction[1].

The following statements on the Law of Adulterine Bastardy in England have been deduced from Treatises on the Law, the dicta of Judges, and the decisions of Courts. It is material to observe that *every* authority, and *every* reported, as well as some remarkable *inedited* cases, are cited; and that the extracts have been made without any desire to establish or support a particular theory; the only object being to show what was held to be Law at different periods, what changes have taken place, and to describe under what circumstances, and in what manner, such alterations have been effected.

Glanville.

The earliest writer on the Law of England is Glanville[2], who was the King's Justiciary in the reign of Henry the Second; and though he does not treat specifically on Bastardy, a few passages on the subject occur in his observations "on Heirs." "The assertion," he says, "which is generally made, that incontinence in married women is no forfeiture of the inheritance, is to be under-

[1] Barrington, speaking of the Statute of Merton, observes,—"Selden, in his *Dissertatio ad Fletam*, says, that Robert Grosseteste bishop of Lincoln, wrote about this time a treatise to prove the necessity of introducing the Civil Law into this country; and Sir Edward Coke mentions, that William de la Pole, Duke of Suffolk, attempted the same innovation in the Reign of Henry the Sixth, which occasioned Fortescue's writing his treatise *De laudibus legum Angliæ*. It was one of the articles of impeachment against Cardinal Wolsey, "quod ipse intendebat finaliter antiquissimas Anglicanas leges penitus subvertere, et hoc regnum Angliæ, et ejusdem regni populum, dictis legibus civilibus et canonibus subjugare."—*Observations on the Statutes*, p. 44.

[2] *Tractatus de Legibus et Consuetudinibus Regni Angliæ*.

Glanville.

stood of the crime of the mother, because that son is the lawful heir whom marriage proves to be such[1]." "Neither a bastard nor any other person not born in lawful wedlock can be, in the legal sense of the term, an heir[2]. But if any one claims an inheritance in the character of heir, and the other party object to him, that he cannot be heir, because he was not born in lawful wedlock, then, indeed, the plea shall cease in the King's Court; and the archbishop or bishop of the place shall be commanded to inquire concerning such marriage, and to make known his decision, either to the King or his justices[3]."

Glanville then recites the writ that was to issue for that purpose, which alleges as the cause of the bastardy of the defendant that he was "born before the marriage of his mother," and states, that as "it does not belong to the King's Court to inquire concerning Bastardy," the matter is referred to the Court Christian to be determined. He proceeds: "Upon this subject it has been made a question whether if any one was begotten or born before his father married the mother, such son is the lawful heir, if the father afterwards married his mother? Although, indeed, the Canons and the Roman Laws consider such son as the lawful heir, yet according to the law and custom of this realm, he shall in no mea-

[1] Quod autem generaliter solet dici putagium hereditatem non adimit, illud intelligendum est de putagio matris quia filius heres legitimus est, quem nuptiæ demonstrant."—*Glanville*, lib. vii. cap. 12. Upon this passage it is observed by Reeves in his *History of the Common Law*, (I. 117.) "Women were not to forfeit their inheritance on account of any incontinence: not that the maxim 'putagium hæreditatem non adimit,' meant this indemnity of women in case of incontinence, for that was to be understood of the consideration the law had of a son begotten under such circumstances, and born after lawful wedlock; who was thereby entitled to succeed to the inheritance as a lawful heir; according to another rule, 'filius hæres legitimus est, quem nuptiæ demonstrant."

[2] "Heres autem legitimus nullus Bastardus nec aliquis qui ex legitimo matrimonio non est procreatus esse potest."—*Glanville*, Lib. vii. cap. 13.

[3] *Ibid.*

sure be supported as heir in his claim upon the inheritance; nor can he demand the inheritance by the law of the realm. But yet if a question should arise, whether such a son was begotten or born before marriage, or after, it should, as we have observed, be discussed before the Ecclesiastical judge; and of his decision he shall inform the King, or his justices. And thus according to the judgment of the Court Christian concerning the marriage, namely, whether the demandant was born or begotten before marriage contracted, or after, the King's Court shall supply that which is necessary, in adjudging or refusing the inheritance respecting which the dispute is; so that by its decision the demandant shall either obtain such inheritance, or lose his claim[1]." Glanville.

It is remarkable that no allusion should be made by Glanville to the possibility of the issue of a married woman being a bastard. He adopts without any qualification the language of the Digest, that legitimacy is proved by the marriage. In the only reference to the subject in "the Mirror," the exact date of the composition of which treatise is doubtful, the same words occur: "A bastard is not to be accounted amongst sons; for the Common Law only taketh him to be a son whom the marriage proves to be so[2]." Mirror.

When Glanville wrote it would appear that questions of Bastardy were tried in the Spiritual Courts only; and if legitimacy then depended solely upon proof of the existence of the marriage of the mother, the cause of its having exclusive jurisdiction in such cases is easily understood.

[1] *Glanville*, lib. vii. cap 15. The passages in the text are taken from Beames' translation, 8vo. 1812.

[2] "Apres le espouse est l'appele de leigne fils litti'me al occise rescevable devant touts autres (litti'me est dit), car bastard n'est my accounct perenter fits car la ley account celuy pur fits que espousells demonstrent." *Mirroir des Justices.*

Statute of Merton, 20 Hen. III. 1236.

Before alluding to Bracton, who is the next writer on the law after Glanville, it is necessary to advert to the Statute of Merton in the reign of Henry the Third. It having been discussed in a meeting of the Temporal and Spiritual Peers at Merton in January 1236, "whether one being born before matrimony, may inherit in like manner as he that is born after, all the Bishops answered, that they would not, nor could not answer to it; because it was directly against the common order of the Church. And all the Bishops instanted the Lords, that they would consent that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, forsomuch as the Church accepteth such for legitimate. And all the Earls and Barons with one voice answered, that they would not change the laws of the realm, which hitherto have been used and approved[1]."

Soon after the Statute of Merton it was determined by a Council, composed of the Lords Spiritual and Temporal, that whenever the issue of "natus ante matrimonium" arose in the King's Courts, the plea should be transmitted to the Ordinary; and that an inquisition having been made by him in these words, "utrum talis natus fuerit ante sponsalia sive matrimonium vel post?," he should send his answer to the King's Court in the same terms without any cavil; that in taking such inquisition all appeal should cease as in other inquisitions of bastardy transmitted to the Ordinary; and that if there should be any necessity for an appeal, it should not be made out of the Kingdom; and it was commanded that such should be the practice in future[2]. The following document, which was probably issued shortly after the decision

[1] *Statutes of the Realm,* authorized edition, Vol. i. p. 4. *Vide* 1 Inst. 244 b, 2 Inst. 96—99.

[2] *Bracton,* lib. v. c. 19, p. 417.

alluded to, does not appear to have been mentioned by any writer on the subjeet, though it affords some eurious information respecting jurisdiction in eases of bastardy, and has long been printed.

Statute of Merton, 20 Hen. III. 1236.

In May 1236, the Arehbishop of Dublin and the Justiciary of Ireland, sent to the King to know what was the law aecording to the eustom of England upon the following points:

"When it happens that the son of any noble born in wedlock raises a question against his brother, begotten of the same mother in fornication before marriage, respeeting the paternal inheritance, and if the brother born before marriage saith in defence that he is legitimate, whether it is in sueh ease to be referred to the Ecclesiastieal Court, and if so, in what form, &c.? Also, if it happen that one born before marriage shall do homage for his lands after the decease of his father, and by reason of his homage so done shall eall his Lord to warrant, what right hath he to sueh eall? And if the Lord ought or will of his own aeeord warrant, whether there can of right be duel between him so born in wedlock, and the Lord so warranting, when there eannot be duel between the brothers themselves?"

The King replied to the first point, that "if the person born before marriage, against whom a question is raised, acknowledges that he was born out of wedlock, he neither ean, aceording to the eustom of England, elaim the inheritance, nor having elaimed it, retain it; and if he alleged that he was born after marriage, the ease was not to be referred to the Ecclesiastieal Court, because the elergy would hold him legitimate[1]. When, however, a similar question was diseussed last year before the venerable father the Archbishop of Canterbury, and the other Bishops, and our Nobles of England, whether an inqui-

[1] *i. e.* Legitimated by the marriage of his parents after his birth.

Statute of Merton, 20 Hen. III. 1236.

sition of such birth ought to be made in our Court or in the Court Christian, the aforesaid Archbishop and Bishops requested that power of inquiry might be granted to them. Afterwards however, when they found that the writ commanded them to answer whether the person was born before marriage or after, they seeing that this would be contrary to their laws, declined to reply, but left it to us and our Court to inquire and determine; and it is not yet decided in our Court under what form the inquiry should be made, whether by the oath of twelve jurors, or by proofs to be produced by the parties. Also respecting a Lord, whether he ought to warrant a tenant against his brother, we answer, that he ought not, because as well he who is born after marriage as he who is born before would in that case be treated in the same manner, and the Lord in receiving of the homage was rather deceived than bound by it. Nor can there, for the reason aforesaid, be duel between them, and moreover because a Lord is more bound to warrant to a claimant born after marriage than to a tenant born before marriage[1]."

Although that document shows that in consequence of the dispute in 1236 the clergy relinquished the right of trying such questions of Bastardy as produced a collision between the spiritual law and the law of England, it is certain that they soon afterwards resumed it; but their power was always confined to cases which depended upon the fact or validity of marriages and divorces.

Up to the period when Bracton wrote nothing is to be found in Treatises on English Law of any other cases of illegitimacy than arose from the parties being born before marriage, or out of wedlock. Glanville is silent on the subject of special or adulterine bastardy; and no

[1] Rot. Claus. 20 Hen. III. m. 13, printed in Prynne's *Brief Animadversions on Coke's Fourth Institute*, in 1669, p. 253.

allusion to it is to be found either in the proceedings at Merton, or in those which have been just cited.

Bracton.

Bracton's celebrated Treatise is supposed to have been written towards the end of the reign of Henry the Third[1]. He was probably educated by ecclesiastics, and the Civil and Canon Law may have formed no inconsiderable part of his studies. It is therefore not surprising that his remarks on the law of adulterine bastardy should, in some instances, be repetitions of what is to be found in the Digest; or that his opinions should be influenced by the school in which he was brought up. This is particularly shown by the earnestness with which he presses the conduct of the husband towards the child, as evidence of its legitimacy or illegitimacy. In some cases its status is made to depend almost entirely upon the recognition or repudiation of the husband; but these facts were allowed little weight by the Common Law. The recognition of the child by the husband is scarcely alluded to in the Year Books; and its legitimacy was made to depend, as much as possible, upon facts unconnected with the conduct of any individual whatever after its conception or birth. With these exceptions, however, Bracton's statements agree very closely with the rules of the Common Law; and if the doctrine of the "quatuor maria" did not prevail in his time, there are at least traces of the existence of a similar principle. He adopts in the fullest sense the expressions of the Civil Law, that he is the father whom the marriage proves to be so, and that the nuptials afford *prima facie* evidence of legitimacy; and he repeatedly says, that if a child "be born of the wife," it must be considered the child of the husband, until the contrary be proved[2]. The exceptions, if not defined with clearness, may nevertheless be easily

[1] A reference, in p. 159, to a case which occurred in Easter Term, 46 Hen. III. 1262, shows that the Treatise was written after that year.

[2] *Bracton*, lib. i. c. 9. p. 6; lib. ii. c. 29. pp. 63. 70.

Bracton.

discovered; and though they occur in various parts of his work, they agree, with singular exactness, with each other. These exceptions consist simply of Impotency, whether permanent or temporary; and Non-Access, whether it arose from impotency or absence.

Many of Bracton's observations apply to *supposititious* children, by which was meant children who were neither begotten by the husband, nor born of the wife; but who were adopted and recognised as the issue of both, for the purpose of succession to the inheritance. These deceptions were sometimes, and more commonly, practised by the wife, to impose upon her husband; or if he were dead, upon his heir.

Upon the first of these causes of Bastardy, Impotency, little need be said. It has always been considered a sufficient ground for divorce: it is in some cases a fact capable of demonstration; and if satisfactorily established by medical testimony, is the most certain and clearest proof that the husband is not the father of the child.

The next point for discussion is, what proofs were admitted of Non-Access, when it arose from Absence? The language of Bracton justifies the inference that the husband must be proved not to have been in the same county [1] with his wife for some time before her conception; and that if he was not impotent, and it were *possible* for him to have had access, the presumption that he was the father of his wife's child could not be shaken. In one place, Bracton, adopting the words of the Digest, says, absence from his wife for ten years, and the birth of the child, who at his return was one year old, would render it a bastard[2]; but in another place, where he

[1] "Provincia."

[2] *Digest*, L. 1, T, 6, s. 6.—"Et presumitur quis esse filius hoc ipso quod nascitur ex uxore quia nuptiæ probant filium esse, et semper stabitur huic presumptioni donec probetur contrarium; ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel alia causa impeditus, vel erat in ea invalitudine ut generare non possit, vel probatur quod fuit absens per decennium et reversus invenit anniculum, hic qui in domo mariti

Bracton.

treats more fully of the subject, he says that if the husband be absent from the realm or county [provincia] for two years or upwards, it is to be strongly presumed that he could not have had access to his wife; and if he finds on his return that she is pregnant, or has had a child who is then one year old, such child is a bastard; and that even if the husband were to recognise and maintain it as his child, it could not be considered legitimate[1]. These deductions from the statements of Bracton are corroborated by his observations on the status of children of married women supposed to have been begotten by an adulterer. "Children," he says, "may also be sometimes rendered legitimate, as by adoption and by consent and will of the parents; as if the wife of any one shall conceive by another than her husband, if the husband shall receive the child in his house, and acknowledge him, and maintain him, as his son, he shall be his heir and legitimate; or if he shall not expressly acknowledge him, so however that he do not put him away, or if the husband shall be altogether ignorant, or shall know or doubt, such [issue] shall be adjudged legitimate and heir, because born of the wife; so however that it may be presumed that he might have begotten him. And the same may be said of a supposititious birth; and so whenever the common opinion may be preferred to the truth. But if there be a violent presumption to the contrary in the aforesaid cases: as for instance, if the husband be proved, on account of illness or frigidity, or other impotence, not to have cohabited with his wife for a length of time, or if it can be proved that he had been out of the realm or county for two years and upwards, and it may be vehemently presumed that he could not have had access to his wife, and when he returned should find her pregnant or having an infant of a year old, whether he should

natus est (licet vicinis scientibus) non erit filius mariti."—*Bracton*, lib. i. c. 9. fo. 6.

[1] See the following note.

Bracton.

acknowledge and maintain it or not, such son shall (not undeservedly) be expelled from the succession because he can be neither son nor heir. But *vice versâ*, where the husband shall be in health and sound [capable of procreation], and shall always remain with his wife in the county, in one house and one bed, if the offspring be begotten by another, or is supposititious, yet if he maintains him and acknowledges him as his son, or, if he disclaims and removes him, yet if he afterwards recognizes him as his son, before credible persons who can prove the fact, he cannot again disclaim him, but he shall be lawful son and heir."[1] In this case Bracton seems to consider that the recognition by the husband was necessary to secure the legitimacy of the child; but it is to be remembered that he is speaking of children who were not begotten by the husband, and who were *made legitimate* by *adoption*[2].

[1] "Legitimantur etiam quandoque quasi per adoptionem et de consensu et voluntate parentum, ut si uxor alicujus de alio conceperit quam de viro suo et licet de hoc constiterit in veritate, si vir ipsum in domo sua susceperit et advocaverit, et nutrierit ut filium, erit hæres et legitimus, vel si expresse non advocaverit dum tamen illum non amoverit, sive vir omnino ignoraverit vel sciverit vel dubitaverit, talis legitimus et hæres judicabitur eo quod nascitur de uxore, dum tamen presumi possit, quod potuit ipsum genuisse. Et illud idem dici possit de partu supposito et sic quandoque communis opinio præfertur veritate. Si autem violenta præsumptio se faciat in contrarium in prædictis casibus, ut ecce, maritus probatur propter aliquam infirmitatem, vel frigiditatem, vel aliam impotentiam coeundi per multum tempus non concubuisse cum uxore, vel si probetur quod extra regnum vel provinciam per biennium vel ultra longe extiterit et quod vehementer præsumi possit quod ad uxorem accessum habere non potuit, et cum redierit pregnantem invenerit vel parvulum habentem anniculum, sive talem advocaverit et nutrierit vel non, erit talis filius (non immerito) a successione repellendus, quia talis filius nec hæres esse poterit. Sed vice versa, ubi vir sanus erit et incolumis et semper steterit cum uxore in provincia in uno domo et uno lecto, sive partus conceptus fuit ab alio, sive suppositus, et ipse eum nutrierit et habuerit pro filio, vel etiam ipsum deadvocaverit et amoverit, si postea ipsum recognoverit ad filium coram viris fide dignis qui hoc probaverint, si opus fuerit, ulterius deadvocare non poterit, sed erit filius legitimus et hæres." *Bracton*, lib. ii. c. 29. p. 63 b.

[2] Lord Coke says that Bracton is the only writer he had read who speaks of legitimation by adoption. 2 Inst. 97.

Bracton.

In another part of his work[1] Bracton expressly says " it is to be noted, as was before said, that if a husband and wife have cohabited together and are both capable of procreation, and she becomes pregnant by another man than her husband, whether the husband acknowledges or repudiates the child, it is legitimate by presumption, because he is born of the wife;" and he adds that " such presumption indeed doth not admit proof to the contrary." Even if the husband were impotent, and lived with his wife, the same presumption was to prevail, " because of the cohabitation," until the contrary was proved; that is, until the *impotency* of the husband was established; for in these two cases " the presumption is preferred to the truth." It seems to have been incumbent upon a husband who was incapable of procreation to relieve himself from the charges of paternity by repudiating the child the moment the pregnancy of his wife was perceptible; and by removing it from his house immediately after its birth[2].

[1] " Et notandum secundum quod superius dictum est quod si cohabitaverint vir et uxor, nec sit impedimentum ex aliqua parte quin generare possent, et uxor de alio quam de viro conceperit, partus legitimus erit sive ipsum vir advocaverit sive de advocaverit: et legitimus erit propter presumptionem eo quod nascitur ex uxore Talis enim præsumptio non admittit probationem in contrarium." *Bracton*, lib. ii. c. 32. p. 70. Mr. le Marchant (*Introduction to the Report of the Claim to the Barony of Gardner*, 8vo. pp. xxxvii. xxxviii.) considers that this passage has been falsely construed, from inattention to the distinction drawn by Bracton between the husband's repudiation and his non-recognition of the child, and adds, " Now this," (the extract in question) " entirely agrees, and in fact is introduced by the author as agreeing, with the doctrine before laid down of the effect of recognition, viz. that when it has once attached to a child, it must always be conclusive in the absence of proof of the husband's impotence or non-access." Bracton certainly commences the sentence by referring to a former statement on the subject, and probably to the 29th Chapter, from which extracts have been made; but there does not appear to be any cause for giving to it a more extended or different interpretation.

[2] " Sed esto quod vir talem in vita sua ad hæredem non recognoscat sed eum amoverit talem, moriatur, licet post mortem suam a custode, vel ab aliquo cujus hæreditas non fuerit, ad hæredem recognoscatur, non valebit. Cum autem fuerit talis natus vel suppositus, vir statim talem a domo sua amoveat, nec faciat eum nutriri in domo sua pro filio, nec alibi, nec permittet

Bracton.

From the manner in which Bracton expresses himself, it may be presumed that no other evidence was admissible to bastardize a child born of a married woman, if her husband cohabited with her, than proof of his impotency; and that non-access on the part of a husband who was not physically disabled from procreation could only be established by his absence from the county for a long time before the birth of the child.

It would, however, appear from another passage, that absence from the county was not in itself conclusive, if it could be shown that the husband might nevertheless have had access to his wife [1].

eum redire ad ipsum. Et de hac materia inveniri poterit de termino Sancti Michaelis anno R. H. quarto incipiente quinto Comitatu Lincoln̄ de Barthol' filio Ricardi, et ubi tenens paratus fuit se ponere in magnam assisam vel super patriam de jure: utrum ipse haberet majus jus tenendi terram in dominico quæ petita fuit, an ille qui petiit, sicut ille qui non habebatur pro filio a patre communi, nec nutritus pro filio in domo patris, sed amotus a domo patris, et sicut ille qui nunquam rediit ad patrem in vita sua, sicut filius, nec post mortem, ad capitales dominos feodi, facturus eis quod de jure facere deberet, et in quo casu tenens retinuit sine assisa, jurata, vel inquisicione, quia petens non potuit præmissa dedicere.—*Bracton*, lib. ii. c. 29. p. 63 [b].

" Si autem simul habitaverint vir et uxor, et vir propter aliquod impedimentum legitimum quod probari possit, generare non possit, si uxor de alio conceperit, propter cohabitationem præsumitur quod partus sit legitimus, eo quod nascitur ex uxore, et standum erit tali præsumptioni donec probetur in contrarium, et sic in istis duobus casibus præsumptio præfertur veritati. Et si pater partum semel advocaverit, iterum illum deadvocare non poterit si hoc probetur. Si autem cum generare non possit propter legitimum impedimentum, partum in utero vel æditum deadvocaverit, et ut decet, a domo sua amoverit, nihilominus tamen standum erit præsumptioni quod partus legitimus sit, eo quod nascitur ex uxore, admittitur tamen probatio in contrarium si certis indiciis doceatur, quod ligitimum extiterit impedimentum, et sic vincit talem præsumptionem veritas et probatio vera. Et licet per talem probationem partus fuerit advocatus a patre, partus nunquam efficietur legitimus cum hoc esset in prejudicium veri hæredis."—*Bracton*, lib. ii. c. 32. p. 70.

[1] " Si partus nascatur post mortem patris (qui dicitur postumus) per tantum tempus quod non sit verisimile quod possit esse defuncti filius, et hoc probato, talis dici poterit bastardus. Item dici poterit bastardus et illegitimus et partus alienus falso suppositus et nutritus ad exhæredationem veri hæredis, ubi mulier fecerit se pregnantem cum non sit. Item si inquiratur per quantum tempus natus fuerit post humationem patris cujus filius esse debuit, ita quod non possit esse verisimile quod sit filius talis. Idem dici

Bracton.

In cases where the husband had not cohabited with his wife for two years, whether he was impotent or not, if the wife was pregnant by another man, or if she falsely pretended to be pregnant and introduced a supposititious child as the heir of her husband, such child was illegitimate, provided there was a strong presumption, arising from the interval of time, and distance of place, that it was not begotten by the husband, even though he recognised it as his child; nor was the presumption of legitimacy "because born of the wife" to be admitted, if non-access could be proved[1], the evidence necessary to establish which has been before pointed out.

Considerable attention was paid by Bracton to the cases of widows feigning themselves pregnant by their deceased husbands. To provide a remedy against such frauds the writ "de ventre inspiciendo" was insti-

poterit bastardus partus suppositus mortuo vero hærede sub custodia, ut supra de qualitate et differentia hæredis de partu supposito. Item dici poterit bastardus ab alio quam a patre progenitus, ubi non sit verisimile aliqua ratione quod possit esse hæres mariti ut si pater abfuerit per longum tempus in terra sancta, quod veritas vincere possit præsumptionem. Sed aliud erit si vir in patria vel extra patriam prope quod accessum habere possit ad uxorem occulte, et maxime si maritus eum deadvocaverit omnino, nisi præsumptio faciat contra ipsum quod partus possit esse hæres, ut supra, et ibi de hac materia ubi perpendi poterit quis sit legittimus et quis bastardus. Et sciendum quod liberorum quidam possunt esse legitimi et quidam bastardi, et aliquando omnes legitimi, et aliquando omnes bastardi, vel unus ex pluribus legitimus et alii omnes bastardi et e contrario, ut supra perpendi poterit de qualitate hæredum. Item notandum quod cum quis partum suppositum semel advocaverit non poterit illum ulterius readvocare si hoc probari poterit, et erit talis filius et hæres de quocunque antecessore tenuerit."—*Bracton*, lib. v. c. 19. pp. 417 b. 418.

[1] "Si autem cum diu simul non cohabitaverint per biennium vel ultra, sive vir generare possit sive non, et uxor concipere vel non, si uxor ab alio conciperet, vel partum supposuerit, ita quod vehementer præsumi possit, propter temporis intervallum et distantiam locorum quod vir talem partum non genuerit, sive talem partum advocaverit sive non, nunquam efficietur partus legitimus. Et licet præsumatur quod legitimus sit eo quod nascitur ex uxore, tamen non erit standum tali præsumptioni nec erit necesse probare contrarium, cum ipsa veritas si de ea constiterit quod simul non cohabitaverunt, doceat contrarium."—*Bracton*, lib. ii. c. 32. p. 70 and p. 70 b.

Bracton.

tuted[1], which is fully described by Bracton and other writers. Every thing connected with the pregnancy was an object of investigation; and the process under the writ has been adduced to prove the admissibility of circumstantial evidence to controvert the presumption of legitimacy[2]. But it is submitted, that such an inference is not well founded; for there is a material distinction between children born during the lifetime of the husband, or in the words of the Year Books, "deinz les espousaills," and those born after the husband's death. The legal doubt which authorizes the writ "de ventre inspiciendo" is not whether the husband begot the child with which the widow pretends to be large, because if she were really pregnant, the paternity would be presumed until the child was born; and it was expressly stated by the Chief Justice of the King's Bench as early as the 41st Edw. III. on an application for an issue to try whether a widow "was with child by her husband on the day he died," that "you cannot have an issue which might bastardize the infant;" and the issue was to ascertain the fact of her being with child or not at the time of her husband's death[3]. The object of the writ "de ventre inspiciendo," in the contemplation of the law, is therefore to ascertain whether the child was *begotten* in *wedlock*, a point of *general*, rather than of *special* bastardy.

It consequently appears that the legitimacy of a child could not be tried until after its birth; and if the period of gestation exceeded the time allowed by law for the birth of a posthumous child, the excess rebutted the presumption of legitimacy. An inquiry into the facts specified in the writ "de ventre inspiciendo" in case the

[1] The earliest record of that writ is in the 4th Hen. III., and the terms of it agree exactly with those in subsequent writs of that nature.—*Vide Rotuli Literarum Clausarum*, lately edited by T. D. Hardy, esq., vol. I. p. 435.

[2] Le Marchant, p. xl.

[3] Y. B. 41 Edw. III., 11. *Vide* postea.

jury found that the widow was pregnant, "de tempore conceptus, quoquo modo, quando, et ubi, et quando crediderit se esse parituram," was therefore not at variance with the maxim "pater est quem nuptiæ demonstrant," or with the rule that the legitimacy of a child born in marriage cannot be disputed, except upon allegation of the impotency, or absence from the realm of the husband, because the *nuptials* did *not exist* at the *time of the investigation*, and the child would not be *born during* the *coverture*. Those principles of law are therefore consistent with an inquiry into the paternity of a posthumous child, more especially if the period of gestation was of such length as to raise a presumption against its having been begotten by the deceased husband; for the legal presumption of legitimacy would, under such circumstances, be rebutted by the legal presumption of illegitimacy. Bracton.

It was probably always open to those who impeached the legitimacy of a posthumous child to adduce evidence of the permanent or temporary impotency of the husband, or of his absence from the realm at the time of its conception, because such evidence was admissible in every other case. In addition to what Bracton says on the subject, when treating of the writ "de ventre inspiciendo," and the process under it, he observes that if a wife falsely pretends to have been pregnant during her husband's lifetime, or after his death, and if they have maintained the supposititious or bastard child as their son and heir, they may be summoned by the true heir to appear before the court, and to produce the said child; when, if either the pretended father or mother acknowledge him as their son, and if the legal presumption in favour of the assertion be such as does not admit of proof to the contrary, he shall be considered legitimate. The presumption in favour of the child's legi-

Bracton.

timacy s described to be, capability of conception on the part of the wife, (although the infant may have been begotten by another than the husband, or is altogether a supposititious child,) living with her husband, and the husband not being impotent. It was nevertheless open to the true heir to controvert any of the facts on which the presumption rested, notwithstanding the admission of legitimacy by the parents[1]; thus proving that the recognition of a supposititious child as the legitimate offspring of the marriage, by the pretended parents or parent, was not sufficient to establish its legitimacy, if it could be proved that the husband was incapable of begetting, or that the wife was unable to bear a child, or that they did not cohabit at the time when it was born; to which facts the evidence against the recognition was strictly confined.

Fleta.

The next treatise on the Law in point of time, after Bracton, is the work entitled "Fleta," which is considered to be merely an abridgment of Bracton. There

[1] "Dictum est suprâ de uxore quæ falsò se facit prægnantem in vita viri sui vel post mortem cum non esset; nunc autem dicendum est si vir vel uxor nutrierit aliquem ut filium et hæredem, qui nec est filius nec hæres, ad exhæredationem veri hæredis, sive partus sit suppositus, sine ab alio conceptus, et ad quærelam veri hæredis summoneantur, quôd sint coram Justic' per tale breve. Rex Vic' salutem precipimus tibi, quod habea scoram Justic' nostris, &c. corpus *A.* & *B.* uxoris sue, vel corpus alterius ipsorum, ad respondendum *C.* filio vel nepoti vel alteri hæredi ipsius *A.* qui se gerit pro hærede ipsius *A.* quare nutriri faciunt *D.* sicut filium et hæredem ipsius *A.* ad exhæredationem ipsius *C.* qui nec est filius nec hæres ipsius *A.* nec esse potest, ut idem *C.* dicit. Et habeas ibi hoc breve Teste, &c. Et in quo casu, cûm comparuerit pater vel mater, vel eorum alter, et talem nutritum produxerint, tunc si talem nutritum in judicio ad filium et hæredem recognoverint, et præsumptio sit pro eis quæ non admittit probationem in contrarium, ut si nascatur de uxore, quæ concipere potest, licet ab alio quâm a viro suo concipiatur, vel si fortè supponatur, cum simul cohabitaverint, nec sit impedimentum ex parte viri quin generare possit nec est impedimentum ex parte matris, quin concipere possit propter sterilitatem et senectutem, talis filius et partus erit legitimus. Si autem verus hæres docere possit contrarium aliud erit, licet parentes aliud in jure confessi sunt, dum tamen hoc probetur. Debet enim confessio facta in jure, naturæ et veritati convenire."—*Bracton*, lib. ii. c. 32. p. 70 [b].

are no material variations between the two treatises respecting Adulterine Bastardy, and the statements on the subject are very nearly in the same words. Fleta.

Those works were followed by the treatise of Britton, which is supposed to have been compiled in the reign of King Henry the Third; but unlike Bracton and the "Fleta," he has only alluded to Bastardy in connexion with real property, in the chapter "on Wards," and in reference to posthumous children. "It sometimes, happens," he says, "that women after the death of their husbands pretend to be pregnant by their husbands when they are not so, to the great injury of heirs, in which case we will that a remedy be ordained;" and he proceeds to describe the writ "de ventre inspiciendo," and the process thereon. That writ was to issue only in cases of suspicion, and the woman was to appear before the sheriff and coroners of the county, and if she said she was pregnant by her deceased husband, a jury of matrons was to be impanelled to inquire into all the facts of the case. If the jury found that she was pregnant, or if they were doubtful on the point, she was to be placed in one of the King's castles or elsewhere in safe custody, so that no woman or other person, who might be suspected of acting falsely, should approach her; and no woman was permitted to visit her until after she was delivered, unless she was related to the plaintiff, a caution which arose from the apprehension of a supposititious child being introduced. If, at the expiration of forty weeks after her husband's death, she was not delivered, or if she proved not to be pregnant, she was punishable with fine and imprisonment for having unjustly kept the next heir out of the inheritance, to which the chief lord of the fee was immediately to admit him. But the legitimacy of a child born within the forty weeks might nevertheless be impeached by the next heir, if he Britton.

Britton.

could aver that it was not begotten by the husband; or that the husband was beheaded[1], or that he was imprisoned for two years, or was in another realm for four years before and after the birth of the infant, without having had access to his wife; or if non-access could be inferred from some other apparent and notorious presumption, "in all which cases we will never that the right heirs shall be disinherited by the adultery of the wife[2]."

[1] Query. The word in the original is "*d'cole*," which has been extended to *decole*. It could scarcely be supposed that a woman would pretend that a man who was executed two years before the birth of the child was its father; and if the mere death of the husband was intended, it was unnecessary to say that he was *beheaded*. In the *Harleian* MS. 493, the word is written "descoylle."

[2] In this, and the other, extracts from Britton, Wingate's edition is followed, except in the words in italics, which are inserted from an early, and valuable copy, in the *Harleian* MS. 493, because the latter are evidently the true readings:—Ascunes foitz avient que femmes *apres* la mort lour barons se feynent estre enceyntes de lour barons que ne sount mye, a grefs damages des heires: en quel cas nous volons que tiel remedy soit ordine, que come ascune de tele deceyte se pleyndra, volons que il eyt de nous breve al visconte del lieu, que il face *saunz delay* vener devaunt luy et devaunt les coroners en pleyn counte la femme de qui le pleynte est faite; et soit enquys de luy si ele soit enceynte, et de qui, et si ele die de son baron que morust, tantost face le visconte vener sages femmes et leales jesques a vj au meyns, et les face jurer sur sayntz de leaument faire et verreyment presenter en les articles dount eles serront charges depar nous. Et puis soient charges que eux sur lour serment enquergent de la femme que se fait enceynte par tast de son ventre et de ses mameles, et en toutes autres maneres dont eles pourrount estre certefies lequel ele est enceinte ou non. Et puis la preignent privement en une meson et enquergent la verite. Et si les femmes dient que ele est enceynte ou soyent de ceo en doutaunce lequel ele soit ou non, adonques volons que le visconte face tele femme mettre en notre chastel ou aillours en sauve garde, issi que nul femme ne autre, de qui suspicion puisse estre de fausine faire, ne luy aproche, et illonques demurge a ses propre custages jesques al heure qu'el doit enfaunter, issint que nul femme ne viegne a ele en le méen temps, forsque del linage le plaintiff. Et si ele ne eyt enfaunt dedens les xl semaynes apres la mort sa baron, ou si ele ne soit trove enceinte, si soit ele punie par prison et par fyn, et les chiefs seigniours des fees tauntost preignent les homages des heires saunz plus long delay faire. Et si ele eyt un enfaunt dedens les xl semaynes, adonques soit cel enfant receu al heritage, si autre heir ne pusse averrer cel enfaunt estre engendre de autre que del baron, ou si il pusse averrer que le baron fut d'cole [*descoylle*] ou enprisone par deux ans ou par *trois* en une autre realme,

Britton.

The facts stated by Britton as being sufficient to establish the illegitimacy of a posthumous child are the same as those mentioned by Bracton, namely, non-access for so long a period of time before the birth of the child as to render it absolutely impossible for the husband to have begotten it; imprisonment for two years; absence from the realm for four years before and after the birth; and any other notorious fact, from which that impossibility could be inferred; and as Britton does not expressly mention impotency, it is probable that physical incapacity was meant, even if it was not exclusively intended by the expression, "autre apparaunte presumpcion communement tesmoyne de toutz gentz."

After alluding to children born before and after matrimony, and also to those born of an unlawful marriage, Britton says, "If any heir be begotten by another than the husband of the mother, in such time that it can be presumed that the husband might have begotten it in matrimony, in such case we will never that, from the adultery of the mother, the inheritance shall be barred from the child; and also if a child begotten by another, and supposed to be the issue of the husband, the which child the husband shall have nourished and acknowledged for his heir, we will that those children be admissible to the inheritance, if the presumption be that the husband of the mother might have begotten it. But if the husbands of such women as nourish children for heirs, who have been so begotten, the which husbands having been prevented by evident illness, or by distance of time and place, if open presumption and common fame, as is above said, make against the husbands, that they could not have begotten such children, notwithstanding the

avant que cel enfaunt fuit née et apres, sauns approcher la femme, ou par autre apparaunte presumpcion communement tesmoyne de toutz gentz; en toutz ceux cas nous ne volons mye que les droitz heires soient desherites par less putages de femme.—*Britton*, cap. 66, pp. 166, 167.

Britton.

husbands be willing to nourish them in their houses, and to acknowledge them for their heirs, nevertheless such children shall never be admissible to the inheritance; nor those also whom husbands find in their houses and repudiate as their issue; and therefore we will that each shall, in such cases, publicly disavow them, and cause such supposititious children to be removed as soon as they are aware of the fact; for he that acknowledges a child for his heir (provided it can be proved by witnesses), can never afterwards disavow him[1]." Britton then describes the process and writ which were open to persons who were aggrieved by the introduction of supposititious heirs, to the same effect as Bracton.

The above passages were taken by Britton from Bracton, and prove that in their opinions nothing could debar a child from the inheritance of the husband, if he

[1] "Et si ascun heire soit engendre de autre que del baron sa mere, en temps nomement que presumpcion poit faire pur le baron que il le poet aver engendre en matrimoigne, en tiel cas ne volons mye que par putage de la mere heritage soit barre al enfaunt, et ausi de enfaunt engendre de autry, *et est suppose* pur le engendrure le baron, le quel enfaunt le baron avera nurry et avowe pur son heire, volons que ceux enfauntz soient receyvables al heritage, si presumpcion face que le baron la mere les poit av' engendre. Mes si les barons de teles femmes qe norissent enfauntz pour heires que ount este issi engendres *lesqueles* barons eyent est desturbes par aperte *maladie*, ou par distance del leu et de temps, si que aperte presumpcion et commune fame come avant est dit face encontre tielx barons que ilz ne poient mye ceux enfauntz engendre, tout voillent tielx barons tielx enfauntz norir en lour mesons et avower pur lour, pur ce nequedent ne soient mye tielx enfauntz receyvables al heritage. Ne ausi ceux que les barons troverount en lour hostels et desavowes pur lour engendrure. Et pur ceo volons nous que chescun en tiel cas apertement desavowe, et face remuer tele engendrure suppose estre sue, sitost come il le savera. Cas puis que il lavera avowe pur sue et ceo soit tesmoyne par visne, il ne le pourra jammes desavower. Et si pleynte nous veigne de ascun droit heire de tel enfaunt suppose nurry et avowe pur droit heire par ascun baron et sa femme en disheretison del droit heire tauntost maunderons al visconte del lieu a la suyte de pleyntyfe, que il eyt le cors de tiel baron et de tele sa femme, et de tel enfaunt que ils norissent, par devaunt nos justices a certeyn jour et lieu, a respondra a tel pleyntyfe qui se dist estre heir mesme cely baron pur quoy il norissent en disheritison de *luy* lavauntdit enfaunt, et avowent pur lour engendrure, que nest mye."—*Britton*, cap. 66, pp. 166 [b]. 167.

Britton.

were born during the coverture, and at a time when the husband could be supposed to have begotten it. The paragraph which follows that statement in Britton is not very clear, because it would seem so far to qualify what precedes it, as to render the legitimacy of a child, begotten under such circumstances by an adulterer, dependent upon the husband's recognition of it as his child. But the same contradiction is to be found in Bracton [1], in whose treatise the *unqualified* assertion occurs where he treats of supposititious births and the writ " de ventre inspiciendo," and the *qualified* statement, which renders the recognition of the husband necessary, in the part where he speaks of children made legitimate by adoption, whereas Britton has introduced the two statements together in the same sentence. It may however be inferred from those writers, that under no circumstances would the husband's recognition of a supposititious child as his heir avail, if there was strong presumption, arising from his absence or impotency, that he was not its father.

The text of Britton is in many places obscure, nor do the various readings from MSS. given at the end of the volume [2], always remove the difficulties. It has been observed that " the partiality for the Civil and Canon Laws, which is so obvious in every page of the writings of Bracton and Fleta, is less characteristic of Britton, who departing with greater boldness from these favourite guides, directed his attention more exclusively to the Common Law [3];" but it will be seen from the preceding extracts, that Britton's statements respecting the law of Adulterine Bastardy are little more than literal *translations* of those of Bracton.

[1] *Vide* Bracton, pp. 63 & 70, and p. 12, *antea*.

[2] Wingate's Edition, 12mo. 1640.

[3] Le Marchant's *Report of the Gardner Case*, p. xliii.

Britton.

The law on Adulterine Bastardy, as well as every other part of the system of English jurisprudence, is however best ascertained and elucidated by the reports of decided cases.

For two centuries the Year Books present almost the only information on the subject; and no other deduction can be drawn from the cases reported in them, than that the legitimacy of a child born during coverture, whilst the husband was in a situation, both physically and morally, to have access to his wife, could not be impeached by any circumstance whatever. Indeed the cases in the Year Books, as well as in all the Reports until the commencement of the eighteenth century, prove that the presumption in favour of the legitimacy of the offspring of a married woman gradually increased in strength; and the most distinguished lawyers appear to have considered it as the soundest wisdom rather to straiten than relax the principle which threw the responsibility of paternity upon the husband.

Although the maxim of the Civil Law that "pater est quem nuptiæ demonstrant" was early adopted by the Common Law, the latter admitted of certain exceptions; and it therefore became necessary to define under what circumstances, and in what manner, that presumption could be rebutted. It has been shown that Bracton and Britton state several grounds upon which the legitimacy of a child born in wedlock might be disputed; but they do not mention the generic appellation which the Year Books give to a class of children, who though legitimate and inheritable, were not begotten by the husband on their mothers; and it is singular that this distinction should have been so little attended to in modern cases as almost to have fallen into desuetude. Nor has sufficient notice been taken of the fact, which explains many apparent contradictions, that a man might in England

be legitimate according to one law, and illegitimate by another. Britton.

The distinction [1] between a *de jure*, and a *de facto*, filiation was marked by a specific legal title. A child born of a married woman whose legal status was at variance with his actual paternity was designated "*mulier*;" but he enjoyed all the municipal rights of legitimacy. By the Spiritual Law a child born in adultery was a *bastard*; but by the Common Law he was *mulier*, unless the husband was impotent, was separated from his wife by sentence of divorce, or was beyond the sea when the child was begotten; and *è converso*. On the other hand, a child whose parents married after its birth was *mulier* by the Ecclesiastical, and a *bastard* by the Common Law. It seems therefore indisputable, that the Common Law always contemplated the possibility of a child being the heir of his father, though it might owe its existence to an adulterer; and the Law did so on account of the difficulty of ascertaining the real paternity, in cases where another man than the husband had sexual intercourse with a married woman, and to prevent the indecency which would attend such investigations. To use the language of a Judge in the fifteenth century, "God alone knew in these cases by whom the woman conceived [2];" and to avoid litigation and uncertainty the law fixed the paternity upon the husband. The apparent anomaly of such a principle will disappear when it is remembered that legitimacy itself is, as Lord Erskine observed, a mere creature of the law; that though so closely associated with the best feelings and usages of society, as to be scarcely separable in idea from the corporeal functions of procreation by the husband, legitimacy may, nevertheless, be produced in other ways; as in the instance in question, by inference and presump-

[1] The authorities for the statements in the text will be found in the review of cases mentioned in the Year Books, &c, *postea*.

[2] Y. B. 1 Hen. VI. 3. *Vide postea*.

Britton.

tion, because such inference and presumption are conducive to the general interests; or, by an Act of the Legislature; or, in other countries, by the will of the Sovereign. Moral justice certainly renders it desirable that none but the real issue of the body of a man, begotten upon his wife, shall inherit his rank and lands; but society merely requires that property shall have an owner, and the bastard or supposititious child may be as competent to hold, and to perform all the duties annexed to it, as the true heir. Marriage, the only source of legitimacy, was instituted for the universal advantage of mankind; and there is no greater moral injustice in making marriage, in some instances, sanction the admission of a bastard to legal rights, than there is in entirely preventing the actual issue of a man's body from succeeding to his property, because the child was not born within its pale. In both cases it is a question of comparative good; and no rational doubt can exist of the wisdom and utility of attaching to marriage that responsibility, and that legal presumption of legitimacy which it has so long possessed. Strong however as this presumption has always been, the English law has permitted it to be rebutted upon unequivocal proof that the husband was not the father of his wife's child; but it is obvious that a fact of so delicate a nature, and which might be asserted from malice, ought to be proved by irresistible evidence, and to be rendered as nearly as possible matter of demonstration.

He who was born in wedlock, that is, of a married woman, during the lifetime of her husband, was *primâ facie* legitimate; and his status could only be impeached by an allegation of *special* bastardy, or as it was technically termed, "special matter." Cases of *general* bastardy which depended only upon the fact or legality of the marriage of the parents, were, as has been already observed, tried before the Bishop of the diocese; because the Ecclesiastical Court was the fittest tribunal to deter-

mine matters relating to the canon law; but special bastardy which depended upon matters of fact unconnected with the existence or validity of the marriage, were properly reserved to the Courts of Common Law, to be tried by a Jury[1]. Britton.

[1] 2 Inst. 99. The following cases, in Ridley's "View of the Civil and Ecclesiastical Law," support the opinion, that in the twelfth century the Ecclesiastical Courts took cognizance of all cases of bastardy, and that the temporal Judges did not proceed to judgment in the principal cause until the incidents were decided by the Ordinary.

"*R. H.* had issue, *J. H.*, who had a son, *C. H.* *J. H.* deceasing before *R. H.* his father, *C. H.* succeeded in his grandfather's inheritance, the latter being dead; but *M. H.* brother of the said grandfather, pretending that the said *J. H.* was a bastard, draweth the said *C. H.* into the temporal Court upon the inheritance: whereupon *C. H.* called the said *M. H.* into the Bishop of Norwich his Court for the trial of his nativity: the Bishop protracting the cause, *C. H.* appealed to the Pope, who delegated the same to the Bishop of Exeter and Abbot of Hereford, with order that if the said *M. H.* should not within two months prove that which he objected against *C. H.* they should intimate the same to the secular Judge that he should not stay any longer upon the question of legitimation, but proceed to judgment in the cause of the inheritance." pp. 251-2.

In the reign of Henry the Second, one Ralph kept Analine, the wife of Allen. During her husband's lifetime she had a daughter, Agatha, who was the mother of Richard. Ralph going beyond sea, left Richard and his mother Agatha in possession of his lands, but, information being received of his death, Francis, the brother of Ralph, seized the lands, pretending that Agatha, his niece and mother of Richard, was not born of lawful matrimony. "Richard obtained letters of restitution, whereby the Bishop of London and others were directed to restore the lands to the said Richard previously to inquiring into the legitimacy of Agatha. The rescript as to the restitution was however recalled by the Pope, and the Bishop of London and others were directed to inquire whether the said Agatha were born of the said Analine in the lifetime of her husband Allen, and when she dwelt and cohabited with him as with her husband: or whether the said Ralph, father of the said Agatha, kept the said Aneline openly and publickly while the said Allen yet lived; and if they found it to be so, then they should pronounce her, the said Agatha, to be a bastard, for that Analine her mother could not be accounted a wife, but a whore, which defiling her husband's bed, presumed to keep company with another, her husband yet being alive: but if they found it otherwise they should pronounce her the said Agatha to be legitimate."

It is scarcely necessary to observe that these proceedings were founded upon the Civil Law.

Britton.

Special Bastardy arose from,

I. The Impotency of the husband; and if he were within the age of fourteen, his corporeal incapacity was inferred.

II. His being separated from his wife by sentence of divorce; for separation without such sentence was insufficient.

III. His being "extra quatuor maria[1];" that is, absent from the King of England's dominions when the child was conceived; and according to some authorities, it was necessary that he should be absent from the realm during the whole period of gestation from the time of the conception of the child, until after its birth.

I. Few allusions to Impotency occur in the Year Books; and the most remarkable of the early cases on the subject are those of *Bury*, and *Done and Egerton*. In the case of *Bury*[2], it was decided that a man who had been divorced on the grounds of impotency, and who had married a second wife, which wife had issue, was the father of the child, because a man might be impotent at one time and capable at another; a decision which shows the anxiety of Courts of Law to avail themselves of every possible pretence to support the legitimacy of children born in wedlock. Of the second case, *Done and Egerton* versus *Hinton and Starkey*, no other report has been found than the notes of it in Rolle's Abridgment[3]. It was then held that the children of the wife of a castrated person were bastards; but an eminent Judge, Sir Henry Hobart, who was afterwards Chief Justice of the Common Pleas, was of a contrary opinion.

[1] "Infra Quatuor Maria means within the Kingdom of England, and the dominions of the same Kingdom." 1 Inst. 107. a.

[2] 5 Co. 98. See also *Morris* v. *Webber*, Mo. 227, and *postea*.

[3] I. 358.

In the case of *Thecar*[1], in the time of Charles the First, a posthumous child was, under other very suspicious circumstances, adjudged to have been begotten by the deceased husband, notwithstanding proof was offered of his physical incapacity for six months before his death; that the infant was born within seven months after that event; and that the widow married another man six days after her husband died. These cases will be more fully stated in their proper order. Britton.

II. The second kind of evidence of non-access, namely, separation from the wife by sentence of divorce, is a matter of fact capable of conclusive proof, and requires no remark. It proceeded on the presumption that such a sentence would be obeyed[2]; and it was incumbent upon the party who contended that access did nevertheless take place, to prove the allegation.

III. The third class of evidence of Special Bastardy is that the husband had not access to his wife. When Bracton and Britton wrote, the strongest proof was necessary to show that the husband was absent from his wife at the moment of her conception; and though they did not consider it requisite that the husband should be out of the kingdom, they nevertheless held it necessary that the parties should be separated by considerable distance of space, and for a long interval of time. Neither of these points is clearly defined; but absence from the county, if not realm, for one, if not two years at the least before the birth is said by those authorities to be indispensable to bastardize a child born in wedlock. The Common Law adopted a similar period; but fixed the geographical limits to absence from the Realm of England, or as it was termed "extra quatuor maria," a line of demarcation which admitted of no dispute.

[1] Littleton, 177; Cro. Jac. 685.

[2] *Vide* case of *St. George and St. Margaret*, 1 Salkeld, 123, and *postea*.

Britton.

Except upon one of these grounds, the legitimacy of a child born during coverture could not be impeached: and although it was once or twice said that elopement from the husband, her living with the adulterer, and the child being begotten by him, would render it illegitimate as well by the Common, as by the Ecclesiastical Law[1], a contemporary commentator denied that such was the law of England, if the husband were within the realm; and it will be seen that the contrary dictum just alluded to, was swept away in the uninterrupted current of authorities and decisions from that time until the commencement of the last century.

Case of Foxcroft, 10 Edw. I. 1282.

The earliest case of legitimacy which is reported is that of *Foxcroft*, in the 10th Edw. I.[2], the facts of which were simply these: A man being ill in bed was married to a woman, by the Bishop of London, privately, in no church or chapel, and without the celebration of mass, the woman being then pregnant by the said man. Within twelve weeks after the marriage she was delivered of a son, who was adjudged a bastard; and the land escheated to the lord in consequence of the man's death without issue. That case has been cited by the highest judicial authorities, including Lords Eldon, Ellenborough and Redesdale, and by several writers, to prove that the legal presumption of legitimacy might *always be rebutted* by evidence that the husband was not the father of his wife's child, *notwithstanding* it was *not proved* that he was *impotent*, or *absent from the realm*, at the moment of its conception. As *Foxcroft*'s case has produced much discussion[3], it was necessary for the purpose of this inquiry to investigate it

[1] Y. B. 7 Hen. IV.

[2] *Foxcroft*'s case, Rolle's Abridgment, I. 359. *Vide* Appendix (A.)

[3] See 8 East, 193, in the *King* v. *Luffe*; *Starkie on Evidence*, II. 137; Mr. Le Marchant's valuable work on the *Claim to the Barony of Gardner*; and *Edinburgh Review*, No. 97, p. 204.

with great attention. All the facts respecting it will be found in the Appendix, where it is shewn that the case was misunderstood by the Judges and writers alluded to: for the point did *not*, as has been supposed, *turn* upon the *husband's having begotten*, or *not having begotten the child*; but *solely* upon the *invalidity of the marriage of the parents*; and both Bracton and Britton [1] state that a marriage under the circumstances there mentioned, though valid by the Spiritual Law, would not render the issue legitimate by the Common Law. As *Foxcroft*'s case has been hitherto understood, it is contradictory to every judgment on record for four centuries; but when properly considered, and compared with the case of *Del Heith*, a few years afterwards, which has hitherto escaped attention, it will appear consistent with all the decisions during that long period.

Case of Foxcroft, 10 Edw. I. 1282.

The case of *Del Heith* occurred in Easter Term, 34 Edw. I. John Del Heith, brother of Peter Del Heith, held lands in Bishopsthorpe, near Norwich, and kept a woman, named Katharine, in concubinage, by whom he had two children, Edmund and Beatrice. Being taken ill, he was advised by the vicar of Plumstead, for the good of his soul, to marry her. As he was unable to go to church, the ceremony was performed in his own house by the Vicar, when the said John Del Heith pronounced the usual words, and placed a ring upon her finger; but no mass was celebrated. From that time the parties lived together as man and wife, and had another son, called William. On the death of John Del Heith, his brother Peter entered his lands, as his next heir; but a writ of ejectment was brought by the said William, as son and heir of the deceased. It was asked on the trial, whether any espousals were celebrated between his pa-

Case of Del Heith, 34 Edw. I. 1306.

[1] *Bracton*, lib. ii. c. 39; *Britton*, c. 100, 101; 1 *Inst.* 34. a. *See* APPENDIX.

Case of Del Heith, 34 Edw. I. 1306.

rents, in the face of the church, after his father recovered from his illness? and because it was not proved that John Del Heith was ever married to Katherine, *in the face of the church*, the Jury found that the plaintiff had no right to the lands; thus proving that he was illegitimate[1].

Radwell's Case, 18 Edw. I. 1290.

In the 18th Edw. I. the remarkable case of *Radwell* occurred, in which the legitimacy of a posthumous child was questioned, It appears that the mother of the infant had not only declared in the Manor Court that she was not pregnant, but had confirmed her statement by a gratuitous and indecent exposure of her person[2]. A child being however afterwards born, an issue was granted to try its legitimacy, and the Jury found that it was born eleven days after the lawful time allowed by the custom of England for parturition, and could not therefore be held to be the son of the deceased husband, "according to the settled law and custom of England;" but if the widow had married another man within those eleven days the child would, it is said, have belonged to the second husband. The child was however declared a bastard, because he was born out of wedlock; and the presumption against his legitimacy was strengthened by its being proved, that the husband had not had access to his wife for one month before his death[3].

It has been said [4] that *Radwell*'s case establishes the

[1] Termino Paschæ, 34 Edw. I. Rot. 293, f. 244, Norf. From the Harleian MS. 2117, f. 339. *Vide* Appendix (A.)

[2] "Et predicta Beatrix presens in Curia quæsita an esset pregnans necne, juramento asserebat se non esse pregnantem, et ut hoc omnibus manifeste liqueret, vestas suas usque ad tunicam exuebat, et in plena curia sic se videri permisit, et dicunt quod per aspectum corporis non apparebat esse tunc pregnans."

[3] *Radwell*'s case, in Rolle's Abridgment, p. 356. *Vide* also Placitorum in Domo Capitulari Abbreviatio, p. 221. 1st Inst. 123 [b], and Lord Hale's note of the case in Hargrave's edition of that work. And see the Appendix.

[4] By Lord Redesdale, on the claim to the Earldom of Banbury. *Vide postea.*

right of a Jury to inquire into facts unconnected with the residence of the husband "inter quatuor maria" during the period of gestation; and that it affords a strong presumption against Lord Coke's doctrine, that, under such circumstances, no evidence is to be received to prove the child a bastard;" but it is obvious that the rule does not apply to this case, because the child was *not born during* the *coverture*. Moreover, some very strong and peculiar facts tended to rebut the presumption of legitimacy. The widow had voluntarily declared that she was not with child at the time of her husband's death; and, principally upon that declaration, the brother of the deceased was admitted to the succession, and had enjoyed it for upwards of a year: the child was not born within the proper period of time; and above all, it was proved that the husband was incapable of the functions of generation for upwards of a month before his death. Thus, the case was one of *general bastardy*, the child not having been either begotten or born within espousals; and it also came within the principal cause of *special bastardy*, namely, the *impotency* of the husband at the time when he might otherwise have been its father.

Radwell's Case, 18 Edw. I. 1290.

The prejudice which prevailed in the following reign in favour of the legitimacy of children born in marriage, is shewn by the emphatic declaration of Sir William Bereford, Chief Justice of the Common Pleas, in a case in the 5th Edw. II., but the facts of which do not throw much light on the subject:—"Whose son soever he might be, throughout all the world, if he was born within the espousals between Thomas and Joan, he shall be held to be the son of Thomas[1]. Nine years afterwards, in the 13th Edw. II.,

Case, 5 Edw. II. 1311.

[1] Y. B. 5 Edw. II. p. 171. "Qui fitz q'il fuist, par tout le monde, s'il nasquist deinz les espousaill entre *T.* et *J.* il serroit tenuz le filz *T.*" A short time before a case occurred in which the question was, whether a suit of bastardy, depending upon the fact of birth before or after espousals, should be tried in the King's Court, or in the Court Christian. *Ibid.*

Case, 13 Edw. II. 1319.

on a case being brought before the same Court, in which an assize of novel disseisin had stated, that the defendant was born and begotten within the espousals between one Thomas and J. his wife, but that he was not the son of Thomas[1], and had never been considered by him as his son, Chief Justice Bereford observed, "You cannot know that; and as you say that he was born within the marriage, you prove him to be his son, after which you cannot make him the son of another." On being told that the husband was in Ireland when the child was begotten, Bereford said, "that does not prove that he could not be his son; the assize has said that he was born and begotten of the marriage, and whatever he may say besides, we hold for nothing." The plaintiffs were consequently non-suited.[2]

Case, 21 Edw. III. 1347.

The next case occurred in the 21st Edw. III.; and the arguments of Counsel, as well as the remark of the Judge, support the opinion that the legitimacy of a child born in wedlock could not be disputed, except for "special matter." In a writ of cousinage, in which the question appears to have been, whether a person was born of the marriage between one Ralph and Margaret his wife, and in which several points of pleading were discussed, it was said by Sergeant Skipwith that the other party did not admit that the said Ralph and Margaret were married when the child was begotten, for in that case it would have been impossible to prove that he was the son of any other person than of the husband of the woman, at the time of his birth; on which Justice Thorpe remarked, "It was not always inconvenient that a man

[1] L'assise dit qu'il fuit nee et engendre deins les esposailles entre *T.* et *J.* sa feme, mes il ne fuit pas le fils Thom. ne luy tient unques pur son fils."

[2] Y. B. 13 Edw. II., Hil. Term, p. 402. Several other cases occurred in this reign, especially 2 Edw. II., 21; 12 Edw. II., p. 375; 17 Edw. II., p. 524; but they contain nothing which is material to this inquiry, as they relate principally to the court in which questions of bastardy should be tried, or to the pleadings.

should be adjudged the son of another than of him, who was married to his mother at the time of his birth; for suppose a man married and died, leaving his wife privement enceinte, and she married again within fifteen days or a month, or within such time that it was impossible that the child could have been begotten by the second husband, I say, in that case the child shall be adjudged heir to the first husband, notwithstanding it was born during the espousals between the wife and the second husband." Justice Willoughby said, "that he had once heard of a case of that kind, in which Chief Justice Bereford ruled, that the child might choose which husband he pleased for his father[1]; but that in the case before the Court they could not aver that the plaintiff was not the son of the said Ralph, because they did not deny that he was born and begotten of Margaret, during the espousals between them; but if Ralph was the son of John they might so describe him, and say that he was born out of wedlock, which averment would be good, and otherwise not." After a long discussion the matter was referred to a jury[2], but the result is not stated.

Case, 21 Edw. III. 1347.

The earliest occasion on which a Judge admitted the possibility of bastardizing a child born during the coverture of its mother, except for the special matter before stated was at the assizes at Salisbury, in the autumn of the 33rd Edw. III. It was averred that one Adam Suel married Alice, and had issue two sons, Joyce and John, who were begotten and born within espousals, and that the said Alice and Adam had lived as man and wife all their lives, and that on the death of Adam, Joyce entered

Case, 33 Edw. III. 1359.

[1] Upon this observation the following remark is made in *Brooke's Abridgment*, "Quod non est lex ut videtur." In *Thecar*'s case, 4 Car. I., (vide *postea*), it was contended that, whatever might be the decision as to which of two husbands a child should be adjudged, yet if he were born in wedlock he could not possibly be a bastard.

[2] Y. B. 21 Edw. III., pl. 30, p. 39.

Case, 33 Edw. III. 1359.

as his son and heir, and dying without issue, was succeeded in the lands by John, his brother and heir; but it was stated by the other side that the said John, through whom the plaintiff claimed, was a bastard; to which it was answered that it could not be alleged that John was a bastard, because it was not pretended that Joyce, his elder brother, was mulier. But Justice Shardelow, who tried the cause, said, "If we could find that Alice separated from her husband, and lived with a chaplain or other person[1], and that John was begotten by such person and not by Adam, the husband, we should adjudge him a bastard[2]." This dictum seems, however, to have been at variance with the law, as it was then generally understood, for the following note was added by the contemporary[3] reporter of the case. "In this he spoke against the law, as I believe, if the husband were within the realm." It is remarkable that the Judge did not allude to the maxim of the four seas; that the commentator confined his statement of the law to the husband's being "within the realm;" and that, comparatively great as was the latitude which Justice Shardelow allowed to a jury, he nevertheless insisted upon three most important points being established, namely, elopement from the husband, living in adultery, and proof that the child was begotten by the adulterer.

Case, 38 Edw. III. 1364.

At the assizes, before Judges Moubray and Chelre, in the 38th Edw. III., an assize was brought against one Oliver B. and Alice, who was the wife of J. F., and the said Oliver claimed the lands in dispute, as son and

[1] "S'eloigna de son baron et demourra ove un chapellain, ou autre."

[2] *Liber Assisarum*, 33 Edw. III., No. 8, p. 200.

[3] As it was material to ascertain whether this comment was made at the period, or by the editor of the *printed* copies of the "*Liber Assisarum*," two *contemporary* MSS. of that work, in the British Museum, have been referred to, viz. the *Harleian MSS.*, No. 5281, fo. 35, and No. 6691, fo. 33, in both of which these words occur, "Et in hoc dixit contra Legem, ut credo, si le baron demure deins le realme."

heir of his father, who had died seised. To which it was alleged that the said Oliver was a bastard, for though he was born during the marriage of his mother, she had left her husband, and lived away from him for seven years, within which time one William de Ketre, a priest, had begotten the said Oliver, and thus he was a bastard. To this it was averred that he was mulier; and the case was sent to the Bishop to certify, though it is not stated that there was any doubt respecting the fact or validity of the marriage. The Bishop certified that he was a bastard, and on the indorsement of the writ which was sent to him was written, "quod prædicta Alicia divertit se à viro suo seorsim per vij annos, quo tempore prædictus Oliverus procreatus fuit de quodam W. K. Clerico, et sic omnino fuit bastardus." As the certificate stated that he was a bastard, and as the indorsement was contrary thereto[1], the proceedings were removed into the Common Pleas, and the certificate was afterwards brought into Parliament[2], where it was determined that it should be tried by the Chancellor and Bishop of London, whether the certificate was good or not; and the parties were warned to appear with their proofs, and to have their challenges, that the matter might be conducted openly, and not in secret. In the meantime the assize was taken at large by Ingleby, who seems to have been the plaintiff's counsel, which alleged that the plaintiff was seised and disseised to the loss of 40 *l.* and 15 *s.*, and that Oliver was begotten by one K., at a time when Alice was away from her husband for seven years, "et sic non fuit de sanguine ipsius Johannis, sed bastardus." The case appears to have been again brought before Parliament, when the proceedings taken by Ingleby were set aside, because the certificate was not discussed; but

Case, 38 Edw. III. 1364.

[1] "Et pur ceo q' en le certificat fuit expresse 'quod fuit bastard,' et l'endorsement, fuit contratriat al ceo."

[2] No notice of this case occurs in the printed Rolls of Parliament.

Case, 38 Edw. III. 1364.

the certificate was afterwards adjudged to be good; when Ingleby took it, the writ, and all the other records, into the Common Pleas. Justice Moubray, on the part of the Court, in giving judgment, said, "As the Bishop has certified by his letters patent that Oliver is a bastard, we can pay no regard to the indorsement on the writ, nor to the inquest taken as to that point without warranty[1]." It was then agreed by the Court that the plaintiff should recover seisin with damages.

This case affords little information on the Common Law respecting Adulterine Bastardy. Although it does not appear for what reason the matter was referred to the Ecclesiastical Court, it is certain that if it came before the Ordinary, he would, under such circumstances, pronounce the defendant a bastard; and the attempt to give the Common Law Courts jurisdiction having failed, in consequence of the Bishop's certificate being held to be good, it was conclusive against the legitimacy[3]. It is therefore not surprising, that the Temporal Courts should be jealous of the authority of the Spiritual Courts; or that they should have struggled, on every possible occasion, to prevent causes of bastardy

[1] "Par ceo q'l est certify par l'Evesque que Oliver est bastard, par la patent de l'Evesque al endorsement del' b're, nous avomus nul reg̃ ne al enquest pris, quant a ceo point sans garr." The following remark on this case occurs in *Dyer's Reports*, p. 313: "It appears that the Bishop made two returns to the writ of bastardy. The one by his letters patent, in which he certified precisely and fully that he was a bastard, and the other was on the dorse of the writ, in which he stated the circumstances and the cause, to which the Court paid no attention, for the writ commanded him to certify, 'per literas suas patent et clausas, &c., and what he returned on the dorse of the writ was surplusage, or nugatory, and ineffectual."

[2] *Liber Assisarum*, 38 Edw. III., pl. 14, pp. 224, 225.

[3] *Rolle's Abridgment*, I. 362. "Si home soit certefie bastard per l' Ordinaire, il serra lie perpetuallment vers tout le mund pur avoider contrarie certification, et pur ceo que est le pluis hault tryal de ceo." *Doctor and Student*, 68, et continuera de record, 40 Edw. III., 38; 11 Hen. IV., 84. *See* also 18 Ewd. III., 34; 27 Edw. III., 32; 7 Co. 43, 44. In cases of bastard eigne and mulier puisne, *vide* Rot. Parl. 21 Edw. III., vol. II. p. 171.

being sent to the Ordinary. Nor was it less important, in many cases, to the parties interested ; for their status often depended entirely upon the Court before which it might be tried. It must not be forgotten, however, that it was said in this instance by the defendant's Counsel, (in reply to the allegation that he was born and begotten by the priest, during the seven years in which his mother was separated from her husband) that he was mulier, whence it is evident that the rule of the "quatuor maria" must have rendered him so ; for upon no other principle of law could it possibly have been pretended that he was not a bastard.

Case, 38 Edw. III. 1364.

In an assize of novel disseisin, in Easter Term, in the 39th Edw. III., a similar question arose. The defendant pleaded in bar, entitling himself, as son and heir of one I., who was seised of lands in demesne as of fee, and who had married one Katherine, on whom he begot the defendant, and a daughter, the plaintiff, and died seised, when the daughter entered as heir to her father, alleging that the defendant was a bastard ; but she was ousted by the defendant. The defendant said he had nothing to allege against the special matter, for they were both begotten of one father, and born of one mother, within the espousals. He did not however dare to take a demurrer ; but said he was mulier : on which it was sent to the Bishop of N. to certify ; who certified to the Justices of the Assizes that he was a bastard, in this way, namely, that the said John married Katherine, after which she left her husband, and lived with one Francis Sulyard ; who, whilst she was in adultery, begot the defendant, and thus he was certainly a bastard. The defendant, finding that the Bishop had certified against him, complained to Parliament[1], that the Bishop had certified against the Common Law of England, and prayed his remedy.

Case, 39 Edw. III. 1365.

[1] Nothing occurs of this case on the printed Rolls of Parliament.

Case, 39 Edw. III. 1365.

A writ was then issued to the Justices of Assize to surcease proceedings, but they nevertheless took the assize in right of damages, and adjourned the parties into the Common Pleas; and then a writ was issued to remove the record to the Council, to be tried by the Bishops of London, Bath and Ely, whether he could be adjudged a bastard for the reasons assigned by the Bishop, who decided that the certificate was good upon the matter. Then, because the Justices of Assize took the assize in right of damages against the writ, the Chancellor reversed the judgment before the Council, where it was adjudged to the same effect as the Bishop had certified; and sent the record back to the Common Pleas, and because the Bishop had certified that the defendant was clearly a bastard, it was agreed that the plaintiff should recover her seisin and damages; but the Judges paid no regard to the reversal by the Council, because that was not the place where a judgment could be reversed [1].

Ibid.

In a case in Michaelmas Term following, in which it was alleged by the plaintiff that the defendant was a bastard, the following statements were made. To the allegation of bastardy, the defendant answered that his father married his mother at such a church, and that he was born since the espousals; to which it was said that the allegation of general bastardy concluded everything special, and a writ to the Bishop to certify was demanded. The defendant's Counsel observed, that as he averred that his father married his mother, and that he was born since the espousals, that special matter proved he was mulier, to which no answer could be made; and he therefore prayed the assize. Sergeant Fincheden, the counsel for the plaintiff, then said that they were not obliged to answer to that matter. Chief

[1] Y. B. 39 Edw. III., 14. This case is noticed in Lord Hale's "*Jurisdiction of the House of Lords,*" p. 41, to show that the Courts of Common Law did not admit the power of the King's Council to reverse their judgments.

Case, 39 Edw. III. 1365.

Justice Thorpe observed, "there never was any other usage than that bastardy shall be tried by assize without reference to the Bishop, except now lately; because when he alleges special matter which proves him mulier, there is greater reason to answer to that." After some unimportant observations, Sergeant Wichingham, who was soon afterwards raised to the Bench, said, "In this case, when special matter is pleaded to prove himself mulier, we ought to maintain the jurisdiction of this Court, instead of sending it to be tried by the Court Christian; for as he was born within espousals, albeit he was begotten by another man, still by our law he is mulier, and by the law of Holy Church he is a bastard; therefore we ought to determine it according to our wise laws, rather than send it to the Court Christian, where the laws are contrary." Sergeant Belknap also argued to the same effect; "If," said he, "one be born before marriage, and afterwards his father married his mother, by the law of Holy Church he is mulier, and by the law of this land, it is ordained by statute, that it shall be tried here, without being sent to the Court Christian; and when he is born within espousals, although he was begotten by another, the law of this land will adjudge him mulier, and by the law of Holy Church he is bastard. Therefore when this Court has cognizance, by the plea of the party, that he was born within espousals it ought to try the cause, and to adjudge it according to the law of the land." Fincheden then abandoned this part of his argument[1], and alleged that as his parents had been divorced, because his father was godfather to one Alice, his wife's cousin, he was a bastard. To this it was said that they had not been divorced in their lifetime, when Chief Justice Thorpe observed, "You first allege bastardy, to which he alleges the mar-

[1] "Et puis *Finch.* passa oustre et dit q' divorce, &c."

Case, 39 Edw. III. 1365.

riage of his parents to drive you from that general plea; you then set up a divorce to support your first plea; but this has destroyed it, because the divorce did not take place in the lifetime of the parties, and because it was not 'nisi pro peccatis;' and though perhaps he would be a bastard by the law of Holy Church, yet by the law of this land he is mulier, because the marriage continued all their lives." The Counsel for the plaintiff still, however, contended that the defendant was a bastard, if they had at any time been divorced; but after a long argument, as to whether a child could be bastardized, because his parents might have been divorced, notwithstanding that no divorce did take place in their lifetime, the Court held that no one could be rendered a bastard on that ground; for, as Chief Justice Thorpe forcibly remarked, "on such a pretence, might every Commissary bastardize every man in the world, without his knowing anything of the matter, which would be most mischievous[1]."

Although allusion was not made on this occasion to the "special matter" of impotency, divorce, and absence from the realm, it must be inferred that Wichingham and Belknap did not intend to deny, that either of those facts would bastardize the child of a married woman; but they probably referred only to such cases as the one then before the Court, in which no "special matter" could be proved. This inference is supported by another case in the same year, when Chief Justice Thorpe, on refusing an issue to try the legitimacy of a person who was born of a marriage which was voidable, after the decease of the parties, because "it would be too much to bastardize the issue of the parties after their decease; for in that way every man might be bastardized," said, that "he who was begotten and born within

Ibid.

[1] Y. B. 39 Edw. III., Mich. Term. p. 31.

marriage shall be adjudged mulier," and added, "hence it seems, that without special matter you cannot be allowed to bastardize him[1]."

Case, 40 Edw. III. 1366.

Within twelve months afterwards, it was said by Justice Fincheden, (who was subsequently Chief Justice of the Common Pleas,) "By the law of the land he never can be a bastard, who is born after espousals, unless it be by special matter; as if there is a divorce, or where his mother continued in adultery, or by other such matter. In this case the manner ought to have been pleaded, whereas the espousals are presumed; and as it is moreover said that he was born within the espousals, he has said enough; for by the law of the land he never can be considered otherwise than mulier[2]."

Justice Fincheden's dictum agreed, in this instance, with that of Chief Justice Thorpe in the preceding year[3]; and it partly explains what was then considered "special matter;" but, like Justice Shardelow, seven years before, he appears to have included in "special matter" the wife's "living in adultery," without insisting upon the absence of the husband from the realm when the child was begotten.

Case, 41 Edw. III. 1367.

The case in the 41st Edw. III. has already been alluded to, in which it was decided by Chief Justice Thorpe, on its being alleged that a widow was not with child by her husband on the day of his death, that an issue could not be granted which might bastardize the infant; and the issue was therefore taken, whether she

[1] *Liber Assisarum*, 39 Edw. III., No. 10, p. 234. The following note occurs to this case: "Et nota q' Thorp tient le t' ore en prior cas donque il fuit avant les espousels conu; car par l'opinion de Kniv' et autres, sur la primer demurrer, les Justic' deurent av' mande al' Evesque a certifier la bastard'. Et issint fist Ing' en sa sessions en ceo cas, &c." 39 Edw. III., No. 14, p. 235.

[2] "Car par le ley de terre il ne puit my estre entende mes q'il est mulier." Y. B. 40 Edw. III., pl. 6, pp. 16, 17.

[3] Ut supra.

was with child at the time of her husband's decease or not [1].

Case, 43 Edw. III. 1369.

In the 43rd Edw. III. some light was thrown upon the law of Adulterine Bastardy, by a case in which a woman who had eloped from her husband, and lived continually in adultery in Southwark, without having been reconciled to him, claimed her dower; alleging that she had been taken from her husband, and conveyed to a distance of forty miles against her will; that she returned to his house four days afterwards, but found him dead; and that she

[1] Y. B. term Pasch. 41 Edw. III., pl. 9, p. 11. This case was alluded to in the following manner by Mr. Tindal (now Chief Justice of the Common Pleas), when counsel for Mr. Henry Fenton Gardner, a claimant of the Barony of Gardner: "In a very early case that occurred, and which is to be found in the Year-books, a question arose upon a right of dower; the tenant pleaded "that the demandant kept the charter of the land from him, who was the brother and heir of the baron;" the replication was, "that she was then pregnant by the baron of one who would be the heir, and issue was offered that she was not with child by her husband on the day of his dying, and this the party was ready to verify." So that the party who meant to challenge the legitimacy of the child then unborn thought proper to shape his issue, that she was not then with child by her husband on the day of his dying. Now my Lord Chief Justice Thorp, who was at that time Chief Justice of the King's Bench, said, "You cannot have such an issue to bastardize the child;" and then the report goes on to say, "therefore issue was taken whether she was with child on the day of the decease of her husband or not;" thus making the important distinction between the way in which the party had shaped the issue originally, and the way in which it was taken afterwards; a distinction that will fully admit the principle for which we are contending, for the party disputing the legitimacy says, the woman who is claiming her dower was not with child by her husband on the day of his dying. The court say, that is not a point to be contested, you shall try whether she was with child on the day of his dying; the woman being living with her husband, and being with child, we will not allow that you are in a condition to dispute the other part of the case, whether that child was begotten by her husband or not: either you must show some specific matter, that the husband was impotent or incapable, or you must show that he was not within the four seas, or some other reason which shows that he could not be the father, but you must not take issue upon the dry single question, whether a woman living with her husband is with child by her husband or not, though, if her husband dies, you may take it in a more general way, whether she was with child at the time of the death of her husband." —*Report of Gardner Case*, pp. 227, 228.

had instituted a suit against her ravisher. Judge Kirton said, " If a woman elopes from her husband with her adulterer out of the country[1], and had issue by the adulterer, the issue shall be adjudged a bastard by the law of Holy Church; and the woman who lived with her adulterer is not dowable;" but Serjeant Belknap observed, " He shall be adjudged mulier if the husband lived within the four seas, so that he might come to his wife, *which was not denied*[2]."

Case, 43 Edw. III. 1369.

As the Judge confined the illegitimacy of the child in this case to the Spiritual Law, it would seem that he did not consider it was a bastard by the Common Law. This inference is confirmed by the remark of Belknap, that " if the husband was within the four seas, the child was mulier," and agrees with his observation, as well as with that of Serjeant Wichingham two years before[3], that " if a child is born within espousals, even if begotten by another than the husband, it is mulier by the Common, and bastard by the Ecclesiastical Law," which opinions are, however, at variance with the dictum of Judge Shardelow in the 33rd Edw. III. The only difference in the two statements of Belknap is, that on the latter occasion he noticed the " special matter" of the husband's being out of the realm; and the words, " so that he might come to his wife," explain the principle upon which the doctrine of the four seas was founded, namely, that absence from the realm was conclusive *evidence* of *non access*. It is important to remember, that Belknap's definition was " *not denied*" by the Court, or by the Counsel opposed to him, and it must therefore be considered as a sound exposition of the Law, as it

[1] ' Hors du paiis."

[2] " Il serra adjuge mulier si le baron demurt deins le quater miers issint qe il poit venir a sa femme, *quod non fuit negatum*." Y. B. 41 Edw. III., pl. 5, pp. 19, 20."

[3] Y. B. 39 Edw. III., 31. b., *vide* p. 41 antea.

was understood in the latter part of the fourteenth century.

Case, 44 Edw. III. 1370.

In the 44th Edw. III., a similar case occurred to that of *Foxcroft* in the 10 Edw. I.; but the point immediately before the court seems merely to have related to the manner in which the cause should be tried. It was stated by Serjeant Belknap, that one *H.*, in the late pestilence, lying ill on his death bed, was induced by covin of the tenant to marry the mother of *A.*, at which time she was enceinte with *A.* by another man; that the said *H.* was not then of sound memory, in consequence of his illness; that he died the second day after the marriage; and that thus *A.* was a bastard. But it was contended by Kirton, that the mother of *A.* was the concubine of *H.*, and was with child by him; that he married her for conscience sake; and that the marriage lasted fifteen days, so that *A.* was mulier. Belknap replied, that, as it was admitted the wife was large with child before the marriage, the child was a bastard. Justice Fincheden said "If the mother was with child by *H.* before the espousals, and he married her afterwards, the issue born afterwards should be adjudged mulier; but if she was with child by another, then it was a bastard. And as to what Belknap has said, that she was with child by another before the marriage, and therefore it is a bastard, whilst the other side aver, that she was with child by *H.*, and therefore mulier, these facts could be better tried 'per paiis' than in any other manner." Upon this case the reporter has observed "Sic nota, procreati ante matrimonium et postmodum nati in matrimonio, sunt legitimi, &c [1]." The point at issue seems to have been, whether the child was begotten by *H.*; because it never was doubted that a valid mar-

[1] Y. B. 44 Edw. III., pl. 21, p. 12; and 45 Edw. III., pl. 45, p. 28.

riage of the parents rendered a child legitimate, even if the ceremony took place only an hour before it was born; and it was ruled in subsequent cases, that it mattered not by whom the child was begotten, for the marriage fixed the paternity on the husband. It is remarkable that nothing was said respecting the nature of the marriage on that occasion, for according to Bracton, and Britton, supported by the two cases of *Foxcroft* and *Del Heith*, it would not appear to have been valid at Common Law [1]. There is, however, reason to believe that an alteration had taken place in the law on the subject in the sixteenth century, if not at a much earlier period; and the change may have occurred before this case arose [2].

Case, 44 Edw. III. 1370.

No other case of importance is mentioned in the Year Books for nearly thirty-five years, at which time it seems to have been settled, that by the Common Law a child born during the coverture of its mother could only be bastardized by the "special matter" which has been described. So universal was that opinion, that it was then embodied in an English proverb, more remarkable for its force than decency; but it was nevertheless quoted from the Bench, was introduced into Law treatises; and, like most English apophthegms descriptive of popular sentiments, has been used by Shakespeare [3].

Case, 7 Hen. IV. 1406.

In a suit for a *scire facias* without fine, in Hilary Term in the 7th Hen. IV., 1406, it was averred, that one Julian married William de B. in the county of N. and had issue William de B., who was the father of the tenant; but it was answered that the said Julian was not the mother

[1] *Vide* antea, p. 7; and Appendix, No. 1.

[2] "Et ad este tenus en temps le roy Henry le tierce (M. 10 Hen. III., dower 200,) que si *femme* ad este *espoused en un chambre*, qui ele *n'avera dower* par le comen ley; mes *le ley est contraried a ceo jour*." *Perkin's Profitable Book or Treatise of the Laws of this Realm*, 12mo. 1532.

[3] *Vide* postea, p. 64.

Case, 7 Hen. IV. 1406.

of William de B., that she had married one John de C. at Fletham, in the county of York, and had issue Elizabeth, mother of John, father of the plaintiff; that she then went into the county of N , and during the life-time of her husband, married the aforesaid William de B., father of the tenant; so that the said Elizabeth, and not William de B., was her heir. Judge Rickhill said, " If John de C., the husband, was within the sea, the issue was mulier, and heir because he was issue male, for ' who that bulleth my cow, the calf is mine[1].' " Serjeant Tyrwhit, the counsel for the tenant, " dared not," it is said " demur," from which it must be inferred that he acquiesced in the correctness of this definition of the law, which is further proved by his changing his plea; as he protested that it was never known that William was issue &c.' but said that her husband John de C. *went beyond the sea*, and lived there continually years and days, during which time Julian went into the county of N. and there married William de B. and had issue the father of the tenant, who was not the heir of Julian[2]. Serjeant Hill observed, " that amounts to his being a bastard, and we aver that he is mulier," when Tyrwhit rejoined, " You do not answer to the special matter;" upon which Hill repeated his remark, adding that the other party refused that averment[3].

Case, 11 Hen. IV. 1410.

In Michaelmas Term in the 11th Hen. IV., in an appeal of rape of a married woman, on Serjeant Rolfe, one of the counsel, putting this case:—" If a woman

[1] " Si cestuy John fuit deins la mere l'issue fuit mulier et issint heire quant il fuit issue male, ' For who, &c.' "

[2] " Et puis *Tir* n' osa demurrer, mes fist protestation q' il ne conust my, q' cest W. fuit issue, &c. mes dit q' cestuy Julian prist a Baron mesme cestuy J. de C. come devant, et puis cestuy J. ala ouster la mere et la continuelment demurr' ans et jours, deins quel temps ceo Julian ala en le county de N. et le prist a Baron cesty W. &c. et aver issue le pier de tenant issint fuit cestuy J. heire, et nemy le tenant."

Y. B. 7 Hen. IV., pl. 13, p. 9.

goes with her adulterer, and they have issue between them, *the husband being within the four seas*, by our law, he is mulier, and by the law of Holy Church, bastard;" on which Judge Hulse said, "In your case those born and begotten in adultery are bastard, as well by our law, as by the law of Holy Church, where the woman lives with her adulterer[1]." No allusion was made by the Judge to the "quatuor maria," or absence of the husband from the realm; and he appears to have entertained a similar opinion of the effect, on the status of the child, of its mother living with the adulterer, as was expressed by Justice Shardelow in the 33rd Edw. III., and by Serjeant Fincheden in the 40th Edw. III.[2]; the soundness of which was not only questioned at the time when it was reported, but which is at variance with every other authority.

Case, 11 Hen. IV. 1410.

The next reported case illustrative of the law of Adulterine Bastardy, took place in Michaelmas Term, in the 1st Hen. VI.[3]. One Hugh M. brought a *scire facias*

Case, 1 Hen. VI. 1422.

[1] "La ou le feme demurt ove son avourterer." Y. B. 11 Hen. IV., No. 30, p. 14.

[2] *Vide* pp. 36. 43, antea.

[3] Mr. (now Chief Justice) Tindal observed on this case, when Counsel in the claim to the Barony of Gardner:

"Another case followed, at a considerable period of time, where the question arose as it does here, upon the legitimacy of a child who claimed as the tenant in tail; and it may be sufficient to state, that the substance of the question that at last arose was, whether a person who claimed as a tenant in tail was or was not the legitimate son of the first taker in tail? Now it appears that the other side, who disputed the legitimacy, put in several facts, some of which amounted to suspicion only, and others which appear to amount to an actual impossibility of a child being the legitimate son of those parents; and it should be observed how cautiously and carefully the court separated the one from the other, telling the party that they were not to bring forward those matters of suspicion only, it being impossible, by the law of this land to mix them up together, but that they must stand or fall by the single question, whether the child could possibly be that of the parent from whom he claimed. The plea which the party put in, to dispute the legitimacy was, that long before the time of the espousals she was great with child, and notoriously by one *C. P.*, namely, the same Hugh, the demandant; and then they go on to say that the father of the demandant espoused her, and then

Case, 1 Hen. VI. 1422.

against S. H. of a fine, by virtue of a remainder in tail to K. his mother and her heirs male, and showed that one J. F. married his mother, and that he was her heir male; to which it was answered, that long before the marriage between J. F. and K., she was notoriously large with child of the said Hugh, the demandant, by one T. P.; that after her marriage with J. F. she eloped from him with C. P., and lived a certain time in adultery, within which time, Hugh, the demandant, was born.

that she eloped from him, and that she lived with the other party in adultery, and remained there a certain time, within which time the demandant was born. The party thus mixing up his allegation of the illegitimacy of this child with mere matter of suspicion, from which it might be inferred that he could not be the legitimate child, namely, that the mother had lived in adultery before the marriage, that she married the husband when she was already great with child, that she quitted the husband, and afterwards went to the adulterer, that she lived with that adulterer, and that the child was born while they were so living together. Now let us see how the wisdom of the court, in those early times, treated those allegations relating to the suspicious birth of this child. One of the judges [counsel] says, and he delivered the law of the land, " although she elopes from her husband, and remains with her adulterer, yet the son is legitimate, and shall inherit, unless the other party can show some special matter," that is, an impossibility of access from which the child could be the offspring of its pretended parent. Then further on another learned judge [counsel] says this: " when an action is brought it is not enough to destroy the legitimacy in this way, for it ought to conclude upon the right, and say he is a bastard, which goes to the action; but this that you put is only matter of evidence, it is nothing otherwise; for I say that if you can bring this writ against one *N.*, son to such a one, whether he is a bastard, the writ shall not abate unless that fact is brought immediately in issue;" and then he goes on to say afterwards, " but as to the elopement, and as to the adultery, that is only matter of suspicion; it is not a matter which renders the issue by impossibility the offspring of the parent." Those are two of the earliest cases which are to be found in our books. There is almost a miraculous regularity in which, from that period down to the present time, the legitimacy has been always made to depend upon the single fact, whether possible or impossible, and not whether probable or improbable."—Le Marchant's *Gardner Case*, p. 227-230. This case was thus noticed in the arguments of the Solicitor-general and Mr. Adam on the same occasion: " The question in the case was the legitimacy of an individual, who, it was obvious, was not the child of the husband; but the intercourse of the adulterer and the wife, from which the pregnancy originated, was prior to the marriage. The counsel applied for an issue, whether the woman had not been with child by *C. P.*, and the

Serjeant Rolfe, for the demandant, contended that " he was entitled to have execution; for there were three points in the case; namely, the elopement, the living in adultery, and being large with child before the marriage; that with respect to the first two points, the elopement and living in adultery, they were not to the purpose, for the law of the land was this;—that though a woman eloped from her husband, and lived with her adulterer, still the issue is mulier, and would inherit, if other special matter is not shown; that no attention could be paid to the woman's being with child before marriage, for enceinte or not enceinte was a good issue, and should be tried by writ de ventre inspiciendo; but the defendants offered an issue which could never be tried, viz. that the mother, was large with child by one C. P., for God alone knew by whom she was pregnant; for which reason, if a woman before marriage be with child, and it be born within espousals, the Law adjudges it to be the child of the husband, because it is known to no one, &c. A woman may be with child for seven years. Let us suppose, that a man is married to a woman for twenty years, who at the beginning had issue a son, and another at the end of the said twenty years; the father dies, and the mother of the last issue enters; the eldest son enters upon her; the younger ousts him; the eldest brings assize; the youngest now, by your conceit, can say, that his mother

Case, 1 Hen. VI. 1422.

judge very properly refused it. Under any circumstances, the issue was improper; for though it may be proved *collaterally* that an adulterer is the father, the law will not formally recognise his paternity. It would be an encroachment on the privileges of marriage to allow the relation of parent and child to result from an adulterous intercourse. The judge [counsel] felt this strongly, and expressed himself with warmth; departing from the question before him, he *extrajudicially* deprecated the admissibility of evidence of suspicion in trials of legitimacy; and went so far as to doubt whether a case could arise to justify suspicion. In support of this theory, he cited a case from his own knowledge of a woman who had gone with child seven years! This specimen of his sagacity may dispense us from examining his opinion any further."—*Ibid.* p. 271.

Case, 1 Hen. VI. 1422.

was large with child with him, a long time before the marriage, by a stranger, and so bastardize him, which never can be the intention of the law." In support of this argument he cited the opinion of Chief Justice Thorpe, in the 41st Edw. III., that the paternity of a child could not be tried before its birth[1]. Serjeant Strangways, who was on the same side, said, "When we have brought our action, he cannot destroy our action by argument or evidence; for he must conclude upon the writ, and so bastard, which goes to our action; and what he has shown is only matter of evidence, which is no answer. Moreover, he has given us a father, viz. C. P., and his object is to prove us a bastard, and then we are no son, and cannot have a father, so that his answer is nothing, and is, in a manner, contradictory. I will suppose, that I bring a writ against one N., son to such a one, whereas he is a bastard, my writ shall abate, because a bastard cannot have a father, for he is called 'filius populi;' and therefore, I know well, that if it had been alleged that Hugh was the son of her first husband, and that he was born within the first seven or eight weeks after the marriage of J. F. and K., then it would have been otherwise, *quasi diceret*, it shall be a bastard. As if a child under fourteen years of age[2] marries, and the wife is enceinte, the issue shall be

[1] Y. B. 41 Edw. III. 11. *Vide* p. 43, antea.

[2] The presumption of law, that a boy of the age of fourteen has had sexual intercourse with his wife, agreed in the following instance, and probably in most other cases, with the fact. Thomas Vaux, son and heir apparent of Nicholas Lord Vaux, married Ann, daughter and heiress of Sir Thomas Cheyney; and the jury state on their oaths, in the inquisition on his father's death, on the 10th November, 15th Hen. VIII. 1523, "Quod predictus Thomas Vaus fuit xxv^to^ die Aprilis anno quinto decimo dicti Domini Regis nunc etatis quatuordecim annorum. Ac postea idem Thomas legatie etatis consensus in vita predicti Nicholai Domini Harowden existens cum prefata Elizabetha uxore sua nuper dicta Elizabetha Cheyne, etatis sexdecim annorum et amplius existens in *complementum matrimonii inter ipsos prehibiti concubuit, et ipsam carnaliter adtunc cognovit.*"

a bastard, for that special matter; because it cannot be intended by any law, that a child under that age can beget. So in this case, it is presumed that she had first a husband, and that, &c.[1] Hugh was born within seven or eight weeks, or within such time after the marriage, &c., then the law applies to him[2]; but it has not been so presumed in this case. With this agrees Thorpe, in Mich. 21 Edw. III., in a writ of cousinage[3]." Serjeant Thorpe was of a contrary opinion; and Serjeant Cottismore would have spoken to the same purport; but the Court took time to consider; and at the end of the term execution was awarded, thus deciding in favour of the demandant[4], and establishing his legitimacy. By "other special matter" besides the elopement and living in adultery, Serjeant Rolfe must have meant the impotency of the husband, his being under fourteen years of age, a divorce, or his being beyond the four seas.

Case, 1 Hen. VI. 1422.

In Hilary Term, in the 18th Hen. VI. in a case of bastardy, depending on the validity of a marriage, and in which the point at issue was, in what Court the cause should be tried, a long argument occurred. Judge Paston cited the proverb quoted by Judge Rickhill in the 7th Hen. VI., that "whoso bulls the cow, the calf is yours;" and Serjeant Markham said, that if in formedon the demandant claims as son of his father, or if the don was made to his grandfather, it is a good plea for the tenant to say, that the demandant was born in another county, and that his father, for three years before his birth, and for three years after, was beyond the sea. Ayscough, the King's serjeant, and afterwards a Judge, also observed on that occasion, "If in an action ancestral

Case, 18 Hen. VI. 1440.

[1] "Il est surmis est fait que cestuy aver' primerement baron et que, &c. Hugh fuit ne," &c.

[2] "Donque la ley est servi pur lui."

[3] Y. B. 21 Edw. III. 39. *Vide* p. 34, antea.

[4] Y. B. 1 Hen. VI., pl. 8, p. 3.

Case, 18 Hen. VI. 1440.

against me, I say that the father of the demandant was not more than six years of age immediately before his birth, or that his father was beyond the seas six years before his birth, or that his father and mother were divorced on account of a pre-contract, these are good pleas, without saying more, and so to bastardize[1];" thus noticing all the "special matter" by which a child, born during coverture, could be rendered illegitimate; among which was the absence of the husband from the realm, for a sufficient length of time to render it absolutely impossible that he could have had access to his wife.

Case, 19 Hen. VI. 1441.

The same rule of law was mentioned by the Court in a case in Michaelmas Term in the following year. It was pleaded that the plaintiff was a bastard, but it was objected to that plea that his parents were married, and that the plaintiff was born within espousals. Serjeant Fortescue, afterwards the celebrated Chief Justice, observed, "that is no plea;" on which Justice Newton said, "It is true; for that may be, and he still be a bastard, because his father was perhaps beyond the sea for seven years, within which time he was born and begotten, and all is true which you have said, and still he is a bastard." Serjeant Markham, who was also counsel for the plaintiff, observed, "Sir, then we say 'oultre,' and so mulier[2]."

Case, 36 Hen. VI. 1457.

The impossibility of bastardizing children begotten and born within marriage, except for "special matter," was strongly stated by Justice Danby, in the 36th Hen. VI. "If a man alleged in an action ancestral that his father took to wife such a one, and pleaded the espousals in special, and had issue, himself, and then died seised, it is no plea to say he is a bastard generally, because it is impossible, if he were begotten and born in marriage,

[1] Y. B. 18 Hen. VI., pl. 3, pp. 32. 34.
[2] Y. B. 19 Hen. VI., pl. 38, p. 17.

that he should be a bastard, unless it be from special cause[1]."

Before proceeding with the cases in the next reign, it is desirable to notice what is said on the subject in the only contemporary Treatise on the Law. Sir John Fortescue, who had been Chief Justice of England, in his work "De laudibus Legum Angliæ," has made no other observation, bearing upon this question, than the following, which agrees, so far as it goes, with the decisions of the Courts: "Both the Civil Law and the Laws of England, however wide in other respects, agree in this, that he is the father whom the marriage declares so to be[2].

Fortescue, De laudibus Legum Angliæ.

The law of Adulterine Bastardy was also defined in the next case that occurred, namely, in the 18th Edw. IV. when the point at issue was, whether the son of the marriage of two persons who were within the prohibited degrees of consanguinity, and who were for that reason afterwards divorced, was legitimate?

Case, 18 Edw. IV. 1478.

Justice Littleton, of whose profound knowledge of the law, his treatise on "Tenures" is an imperishable monument, said, "It seems to me that he is a bastard. There are many cases where a man is a bastard by our law, and by the law of Holy Church mulier; and *è converso*, bastard by the Spiritual law, and mulier by our Law. As if a man had issue by a woman, and then marries her, that issue is mulier by the Spiritual law, and bastard by our law, and the Bishop will certify him mulier; but if the Bishop will certify him a bastard, then he is a bastard by our law[3]. But it is otherwise if a man marries a woman large with child by another, and within three days afterwards she is delivered: by our law the issue is

[1] Y. B. 36 Hen. VI., pl. 14, p. 22.

[2] "Nam ambo leges quæ jam contendunt uniformiter dicunt quod ipse est pater quem nuptiæ demonstrant." Cap. xlii.

[3] Because the Bishop's certificate was conclusive. *Vide* p. 38, antea, note 3.

Case, 18 Edw. IV. 1478.

mulier, and by the law of Holy Church bastard; and this is fully proved by the Statute of Merton [1].

Justice Choke spoke to the same effect as Justice Littleton, and added, "There are divers cases in which the issue shall be mulier, and the wife lose her dower, as has been said; as if a woman elope from her husband and has issue in her adultery, she shall lose her dower, and the issue shall be mulier in our law, and yet bastard by the Spiritual law;" and a similar observation was made by Pigot, the King's Serjeant, during the argument [2].

It seems, from these cases, that towards the close of the fifteenth century the rules of law respecting the legitimacy of issue born during coverture, were settled and generally understood; and that the only grounds upon which the child of a married woman, begotten and born during the marriage, could possibly be bastardized, or be adjudged the child of any other man than the husband, was the "special matter" of the impotency of the husband, a separation by sentence of divorce, or his absence from the realm when the child was conceived, if not during the whole period of its gestation, and for some time after it was born. The attempts which were made on one or two occasions to render the cogent, and almost conclusive facts, that the wife eloped from her husband, and lived with the adulterer when the child was begotten, proof that it could not be the issue of the husband, failed; and the Courts, by requiring evidence of the husband's impotency, or absence "beyond the four seas," proceeded upon the principle, that nothing less than *proof* of *physical* or *moral impossibility*, could rebut the legal presumption that the child of a married woman was begotten by the husband.

[1] *Vide* Y. B. 44 Edw. III. 21, antea, p. 46.

[2] Y. B. 18 Edw. IV., pl. 28, pp. 29, 30.

Case, 18 Edw. IV. 1478.

The case in the 18th Edw. IV. is the last which is reported until the reign of Elizabeth; and as numerous instances of Adulterine Bastardy must have happened in so long a period, the only rational way of accounting for there being no report of any trials in which the question was agitated, is by supposing that the Law was so clear as to render a notice of them unnecessary. Under these circumstances, evidence of what was considered to be Law on the subject, during that interval, must be sought from other sources.

Beaumont's Case, temp. Hen. VII.

Sir William Pole, who made extensive collections for a History of Devonshire, in the reign of James the First, and whose accuracy is well known, relates a remarkable case of Adulterine Bastardy, on the authority of "a Book in the possession of Sir Robert Basset," of that county, the descendant of one of the parties to the suit, in which book, Pole says, "the proofs were formerly in due form set down."

William Beaumont, son and heir apparent of Sir Thomas Beaumont, of Devonshire, married Joan Courtenay, and died without issue in the 32nd Hen. VI., 1454[1]. He had been separated from his wife above two years before his death, "he living in London and she in Devonshire, almost eight score miles asunder;" and it appears that she had an illicit intercourse during that period with Henry Bodrugan, whom she married soon after her husband's decease. The estates of the Beaumont family were inherited by the said William Beaumont's brothers and half brothers successively, until about the year 1490; but on the death of the last surviving brother, the lands were claimed by his daugh-

[1] *Esch.* 32 Hen. VI., No. 28. The jury found that "he died without issue on the 5th December 1453, and that Philip Beaumont was his brother and heir." Philip Beaumont died in the 13th Edw. IV. "without issue, and his sister, Alicia Carew, and his nephew, Sir John Basset, son of his sister Joan, were his next heirs."—*Esch.* 13 Edw. IV., No. 50.

Beaumont's Case, temp. Hen. VII.

ter and heiress, and by the issue of a sister of the whole blood of William Beaumont. Another claimant, however, presented himself in the person of the son of the above-mentioned Joan Courtenay, who, having been born during her marriage with her first husband, pretended, after a lapse of upwards of thirty-five years, to be her son by William Beaumont. Sir William Pole says, "the controversy grew into such a height, that it was brought before Parliament," and that "all the proofs of the case were exhibited; but the Parliament would not assent to change the laws of England, to make a bastard which was born in wedlock[1]." It was however agreed, that it should be proclaimed throughout the country that "he was to be named John, the son of Joan Bodrugan, and so to be esteemed a bastard[2]." This decision did not prevent his obtaining part of the Beaumont property, as an amicable arrangement was made, by which the manor of Giddesham, in the county of Devon, and other lands, were assigned to him. His descendants, if not he, himself, assumed the name of Beaumont; they were allowed the Arms of that family

[1] The proceedings of Parliament, of which no notice occurs on the printed Rolls, are thus stated in some additions to a copy of the *Herald's Visitation of Devonshire* in the year 1564 in the British Museum (*Harleian MS.* 3288, fo. 116). In an account of the descent of the manor of Giddesham the above facts are mentioned, and it is then said that "the claim of John so far proceeded, that in Henry the Seventh's time the same came into the Parliament, where he was adjudged a bastard, and proclamation made through England, by authority of Parliament, that he was so; but it appeareth not that any Act was made to bastard him, but by proclamation only. At length he received by composition 80*l.* lands of the old rent, to him and his heirs, whereof this manor was parcel, and was conveyed to him by the name of John, the son of Joan Bodrugan, for that her second husband was called Henry Bodrugan *alias* Bodrogan. This John had issue Henry, called Beaumont, who married," &c. This Henry, the last of the family, "to continue the lands in the name of Beaumont, and for money, did convey the same unto Beaumont, a younger brother of Collerton."

[2] *Vide* Pole's *Collections towards a Description of the County of Devon*; 4to. 1791, pp. 167, 168. *See* also Prince's *Worthies of Devon*, ed. 1809, p. 61.

by the Heralds, without any mark to denote illegitimacy; and they did not become extinct in the male line until the year 1591.

Beaumont's Case, temp. Hen. VII.

In this instance, the child was beyond all doubt the offspring of the adulterer; but strong as was the presumption of that fact, Parliament refused to alter the law, or to make one for the occasion; and the custom, in flagrant cases of profligacy, of bastardizing persons who were *de jure* legitimate, by a special Act of Parliament, was unknown until the reign of Henry the Eighth.

Though the legal status of John Beaumont, *alias* Bodrugan, could not be affected by a proclamation, it made the circumstances of his birth notorious, and tended to deprive him of the local influence which would belong to the *actual* as well as *legal* descendant of an ancient and distinguished family.

Towards the end of the reign of Henry the Eighth two instances occurred of women, in the highest rank of society, having children born in adultery, whilst their husbands were within the Realm. To prevent the spurious issue from succeeding to the husbands' honours and estates, two Acts of Parliament were passed, one of which Acts not only bastardized the children, but declared that, notwithstanding they were *notoriously begotten in Adultery, they would nevertheless be inheritable*; and the other expressly declared that such children "be *legitimate*, and will *be inheritable*."

The first of these cases is that of Lady Parr, in the 34th Hen. VIII.; and the Act[1] states, "that for

Case of Lady Parr, 34 Hen. VIII. 1542.

[1] The Act, which is styled in the Lords' Journals, a Bill "to bar and make base and bastards the children which be, or shall be borne in adultery by the Lady Anne, wife of the Lord Parr," was read a first time on the 13th March 1543, but it appears to have been altered by the Commons. —*Lords' Journals*, I., 217. 223. 224. 230. 233. In the 6th Edw. VI., 1552, a Bill passed for annulling Lord Parr's (then Marquis of Northampton) mar-

Case of Lady Parr, 34 Hen. VIII. 1542.

the last two years she had eloped from her husband, William Lord Parr, and had not in that time ever returned to, nor had any carnal intercourse with him, but had been gotten with child by one of her adulterers, and been delivered of such child, which child "being, as is *notoriously known, begotten in adultery, and born during the espousals*" between her and Lord Parr, "*by the law of this realm is inheritable, and may pretend to inherit all, &c.;*" and the Act therefore declares the said child to be a bastard.

Case of Lady Burgh, 34 Hen. VIII. 1542.

In the same year, a similar Act was passed to bastardize the children of Elizabeth Lady Burgh, the widow of Sir Thomas Burgh, eldest son of Thomas Lord Burgh, who had died in the lifetime of his father. After his son's death Lord Burgh obtained an Act, which stated, "that during the life of her husband she had lived in adultery, not regarding the company of her husband, and in that time had brought forth three children, begotten by other persons than her said husband during the espousals," &c. "as she had confessed, which children *being so gotten and born in adultery, during the said espousals, by the laws of this realm, be legitimate, and will be inheritable and inherit,* &c. after the death of the said Lord Burgh;" and the Act proceeds to declare the said three children to be bastards [1].

The law, so emphatically declared in these Acts, and especially in the last, agrees precisely with the definition of Justices Littleton and Choke, in the 18th

riage with Lady Anne Bourchier, and confirming his marriage with Elizabeth, daughter of Lord Cobham, and for the legitimation of the children that shall be had between them; but the Earl of Derby, the Bishops of Norwich and Carlisle, and Lord Stourton dissented.—*Ibid*, p. 409. 418. The Statute of the 6 Edw. VI. was, however, repealed in the 1st of Mary, 1553.

[1] This Bill, which is described as "a Bill to disinherit the children, and to make base and bastards the unlawfully begotten children of the wife of the Lord Burgh's son and heir," was read a first time on the 8th March 1543.—*Lords' Journals*, I., 215. 217, 218.

Edw. IV., the last recorded case in which Adulterine Bastardy was alluded to, as well as with the majority of previous decisions; and it is impossible to believe that the law would be thus described in those statutes, unless such was the opinion of the ablest jurists in the Kingdom, or that the Acts themselves would have been passed, if they had not been absolutely necessary to bar the spurious issue from the succession. Nothing is said in these Acts of the doctrine of the "quatuor maria," which may be accounted for by both the husbands having remained within the realm during the gestation and birth of the children.

Case of Lady Burgh, 34 Hen. VIII. 1542.

It seems that the conduct of Lady Parr and Lady Burgh inspired the House of Lords with so much alarm, that they attempted to secure female chastity by Acts of Parliament[1]; but the proposed Bills were abandoned, perhaps because the noble authors of them were convinced by their spouses, or by equally competent judges, that it was utterly absurd to legislate on such a subject.

Case of Sir Ralph Sadler, 37 Hen. VIII. 1547.

Five years afterwards, namely, in the 37th Hen. VIII. a remarkable instance occurred of children born of an illegal marriage, being legitimated by Parliament. Sir Ralph Sadler, Secretary of State, married about the year 1534 Ellen Mitchell, who had been the wife of one Matthew Barre, under the belief that she was a widow, as Barre had deserted her for many years,

[1] On the 19th March, 34 Hen. VIII., 1543, a Bill was read, that women lawfully proved guilty of Adultery should lose their dower, goods, lands, and all other possessions; which was sent to the Attorney-general.—*Lords' Journals*, I., 215. On the 17th of April following a Bill was read "for the Incontinency of Women!" *Ibid.* p. 224; but no more is known of this notable project. An equally futile effort to restrain female will, and which was also abandoned, was made at the same time, to prevent women who were heiresses, and had survived their husbands, from disinheriting the children of their first husbands.—*Ibid.* pp. 226. 229. 231. A history of the Bills which have been submitted to, and rejected by the Legislature, would form striking illustrations of human folly; but perhaps it is sufficiently shown in many of the Bills which have passed into Laws.

Case of Sir Ralph Sadler, 37 Hen. VIII. 1547.

and all inquiries about him had proved fruitless. After a connection of several years, and the birth of many children by Sir Ralph Sadler, Barre made his appearance; and there could be no doubt that his wife's marriage with Sadler was void, and that all her children by him were illegitimate. As however her second marriage arose from the misconduct of her first, and indeed only *lawful* husband, and as her marriage with Sadler was made *bonâ fide* with a " pure conscience," under the impression that Barre was dead, Sir Ralph Sadler prayed that it might be enacted, that all his children by her should be reputed and adjudged lawful and legitimate, and be inheritable to him, as if they had been begotten and born in " lawful and perfect, and indissolvable matrimony."

The Act, after reciting all the facts of the case, provides that "Thomas Sadler, Edward Sadler, Henry Sadler, Anne Sadler, Mary Sadler, Jane Sadler, and Dorothy Sadler, and every of them, shall at all times hereafter for ever be had, reputed, taken, esteemed and adjudged legitimate and lawful children, begotten of the body of the said Ralph Sadler, and shall be inheritable, as well to the same Ralph Sadler, as to all and singular his ancestors, and to all other person and persons, and every of them, to be inheritable to other, in like manner, form and condition, to all intents, constructions, and purposes, as if they had been engendered, begotten and born in lawful, perfect and indissolvable matrimony, and as if the said Ellen had never been married to any other than only to the said Ralph, and as though the said Ellen had been lawfully married, in perfect and indissolvable marriage, to the said Ralph, and as though the said Matthew and Ellen had never entered, married, or contracted any matrimony together; any law, statute, act, ordinance, constitution, canon, decree, custom, use, or

any other thing or matter whatsoever to the contrary in any wise notwithstanding." The Act then confirmed the grants made to Sadler and Ellen his wife, and to their heirs and assigns, of the inheritance of the estates of the late dissolved College of Westbury upon Trim, in the county of Gloucester; and provides that if any separation or divorce was prosecuted between Ellen and her husband Matthew Barre, that she should, during Barre's life, be considered a woman sole, as if she had never been married to him; and that by the name of "Ellen Mitchell" she might during the lifetime of Barre take any grant of lands, &c. independently of him, and by that name to sue and be sued as a woman sole [1].

Case of Sir Ralph Sadler, 37 Hen. VIII. 1547.

Viewed as a legal proceeding, the whole affair is anomalous; and, it is believed, had no other precedent in England than the well-known case of the children of John of Gaunt, Duke of Lancaster [2]. Though born in adultery, as well by the Common as the Ecclesiastical law, the children were legitimized, though the marriage of their parents is admitted to have been void *ab initio*. In contemplation of the usual process for a divorce in the Ecclesiastical Court, the Act declares that if such process be completed, she shall be considered a single woman, thus giving her power to marry Sir Ralph Sadler; but it does not appear that the consent of Barre, the first husband, was obtained to the divorce. It is to be presumed that Sadler was afterwards legally married to the lady; but no children appear to have been born after the year when the Bill passed.

In the 1st of Mary, an instance occurred in which the attempt to bastardize the children of a married woman by Act of Parliament, on the ground of the adultery of their mother, failed; and the descendants of one of the

Case of the Countess of Sussex, 1 Mar. 1553.

[1] A copy of the Act will be found in the Gentleman's Magazine for 1835, New Series, Vol. III. p. 260.

[2] *Vide* remarks on this proceeding in the *Excerpta Historica*, p. 152.

Case of the Countess of Sussex, 1 Mar. 1553.

said children, consequently inherited the husband's honours.

Henry Lord Fitz Walter, and Earl of Sussex, married to his second wife, Anne, daughter of Sir Philip Calthorpe, from whom he was divorced; and in December, 1 & 2 Ph. & Mary, 1554, a Bill was read three times in the House of Commons[1], touching the adulterous living of Anne Calthorpe, Countess of Sussex, to bastardize her Children. It is said in the Index to the Commons' Journals, that the Bill was sent from the Lords, but no notice of it is to be found on the Lords' Journals; and it certainly was not then passed, probably because Parliament was dissolved on the day after the third reading of the Bill in the Commons. In the next Session, namely, on the 9th of November, 2 & 3 Ph. & Mary, 1555, a Bill was read a first, and on the 13th of that month, a third time in the Lords, "for debarring of Anne Calthorpe, the late divorced wife of the Earl of Sussex, from her jointure or dower, in case she should not repair into the realm within a time limited, and make her purgation before the bishop of her diocese[2];" but the Act was not passed. In the next Parliament a Bill respecting the Countess's jointure was brought to the Lords from the Commons and passed[3]; but the attempt to bastardize her children was abandoned. The Earl of Sussex died in 1556, leaving sons by his first wife, by whom, or their descendants, his honours were enjoyed until 1629. The said Ann Calthorpe had issue during her marriage with the Earl of Sussex, a son, who died without issue, and a daughter, Frances, who married Sir Thomas Mildmay. After the extinction of the male issue of the Earl, Sir Henry Mildmay, son of the said Sir Thomas Mildmay and Frances his wife, claimed the

[1] *Commons' Journals*, I., 32.

[2] *Lords' Journals*, pp. 499, 500.

[3] *Ibid.* pp. 526, 527. 535.

Barony of Fitz Walter, and it was allowed to his grandson, Benjamin Mildmay, in 1669.

Case of the Countess of Sussex, 1 Mar. 1553.

Few cases are reported, during the reign of Queen Elizabeth, from which the law of Adulterine Bastardy can be deduced; but there is a contemporary writer on the subject whose statement merits attention.

Clerke's Trial of Bastardy, 1594.

In 1594 a work appeared, entitled "The Trial of Bastardy[1]," in which there is the following passage: "If haply he beget her with child (as such mischances fall, whether before or after publication of thy marriage,) so it be born in matrimony, be advised whether the law (in favour of legitimation) groundeth not more upon thy possible excess [access] than the actual cohabitation of the other, presuming him an adulterer; consequently, if thou verifiest not the proverb, 'my cow, my calf,' the bull is not regarded[2]. For touching the cohabita-

[1] "The *Trial of Bastardy*, that part of the second part of Policy or Manner of Government of the Realm of England, so termed Spiritual or Ecclesiastical," by William Clerke: 4to., 1594, p. 41.

[2] This proverb, which was as early as the reign of Henry IV., and was on two occasions in the 15th century, cited from the Bench (*vide* pp. 48, 53, antea), expresses the universal presumption which prevailed in favour of the legitimacy of children born during coverture. Shakespeare, as Mr. le Marchant has remarked (*Gardner Case*, p. iv.), thus introduces it in King John's address to Falconbridge; and it would be difficult to find a more accurate definition of the Law as it was then, and long afterwards, understood:

"Sirrah, your brother is legitimate:
Your father's wife did after wedlock bear him:
And, if she did play false, the fault was her's,
Which fault lies on the hazards of all husbands,
That marry wives. Tell me, how if my brother,
Who has, you say, took pains to get this son,
Had of your father claim'd this son for his?
In sooth, good friend, your father might have kept
This calf, bred from his cow, from all the world;
In sooth, he might: then, if he were my brother's,
My brother might not claim him; nor your father,
Being none of his, refuse him: this concludes,—
My mother's son did get your father's heir;
Your father's heir must have your father's land."

King John, Act I. Sc. I.

Clerke's Trial of Bastardy, 1591.

tion of thy wife with an adulterer, whatsoever may be said in the Canon and Civil laws, consider (for more surety) after the laws of this land, whether thou art within, or without the *four seas*, at such time as the child be conceived."

About that period a case occurred, which has not been before printed, corroborative of the opinion, that the legitimacy of a person, born during the coverture of his mother, could not be shaken, unless the husband was impotent, or absent from the realm.

Cornwall's Case, 5 Eliz. 1563.

Sir George Cornwall, of Berrington, in Herefordshire, married in the 35th Hen. VIII. 1543, Mary, the daughter of John Lord Chandos; but she is supposed to have afterwards cohabited with a gentleman of the name of Meysey, and to have had a son by him, called Humphrey. Sir George Cornwall made his will on the 8th of Oct. 1562, by which he gave his wife 40 *l.* per annum out of the manor of Berrington, "if she consented to remit, and not pretend any right to dower in his other lands." She is not again mentioned in that will; but as the executors refused to act, she obtained letters of administration in March 1562–3. The testator bequeathed all his lands in the counties of Hereford and Lincoln, to his cousin, William Nanfan, Esq., and the heirs male of his body, with remainder, in default of such heirs male, to the Queen, and her heirs and successors. He also left legacies to his relation, William Cornwall, to Eleanor Blunt, his base sister, to many of his servants, and to several other persons, but he did not take the slightest notice of any child of his own. William Nanfan, to whom he gave his lands, was the eldest son of his father's sister; and, if the testator had no issue, was his heir-at-law. Sir George Cornwall died in October or November 1562, and according to the Heralds' Visitations of Worcestershire in 1569, without issue. On the 30th of November following, an inquisition was taken at Lansyl-

lyn, in Wales, by which it was found that he was seised of Kenleigh, Reyngeld, and other manors in North Wales, with reversion to the Crown[1]; that he died *without issue male*; and that the said manors reverted to the Crown. Another inquisition was taken at Horncastle in Lincolnshire, respecting the lands which he possessed in that county, on the 15th of March, 5th Eliz., 1563, above two months after the first inquisition. The Jury found that he was seised, under certain deeds, executed on the 10th of October, 4th Eliz., 1562, (two days after the date of his will,) of various manors for life, with remainder to William Nanfan, Esq., and the heirs male of his body; remainder to the Queen and her heirs; and that *Humphrey Cornwall was his son and heir*, and of the *age of twelve years*. This Humphrey bore the name and arms of Cornwall, and by that name was sheriff of Herefordshire in the 9th Jac. I. Lady Cornwall married to her second husband, Francis Lovell, Esq., and died on the 15th November, 4 Jac. 1606. By an inquisition held at Leominster on the 3rd of October 1607, "Humphrey Cornwall *alias* Meysey" was found to be *her son and heir*, and then forty-eight years of age. The legitimacy of the said Humphrey, thus recognized by two inquisitions, though contradictory to a prior inquisition, and opposed by the non-recognition of his father, and by the settlement of his property upon a cousin, was never successfully impeached; and his descendants have always borne the name and arms of Cornwall[2]. Presumptive

Cornwall's Case, 5 Eliz. 1563.

[1] These manors were granted by the King to his father, Richard Cornwall, in the 16th Hen. VIII., and, it is presumed, with remainder to the heirs male of his body, failing which, they were to revert to the Crown.—*Originalia*.

[2] The Right Honourable Charles Wolfran Cornwall, Speaker of the House of Commons, was his legal representative; and on his death, without issue, in 1789, the male representation of Humphrey Cornwall vested in the Cornwalls of Dilbury, in the county of Salop, of which the late Bishop of Worcester was the head. The Cornwalls of Moccas Court, now represented by Sir George Cornwall, were also descended from him.

Cornwall's Case, 5 Eliz. 1634.

evidence of a remarkable kind exists, that Humphrey Cornwall was considered to have established his legitimacy. In the original Heralds' Visitation of Worcestershire, made in 1634[1], a pedigree was recorded, signed by the son of that person; and as it was first written, Humphrey was connected with Sir George Cornwall by a *wavy* line of filiation, which is the usual *mark* of *illegitimacy*; but the *wavy* line was afterwards converted into a *straight* line, the mark of *legitimacy*; and though some words were appended to his name, of which "son of Sir George," only, is now legible, the filiation line, and that writing, have both been covered with pieces of paper, as if it were wished to obliterate all indications of the first statements; and upon the paper thus pasted over them, Humphrey is connected with Sir George Cornwall by the *straight* filiation line of *legitimacy*. These facts prove, that though Humphrey was, in the first instance, recorded by the Heralds as a bastard, they were afterwards convinced, and probably by some decision in a Court of Law, that he was, *de jure*, legitimate[2].

The most important case, in relation to the law of legitimacy, in the reign of Elizabeth, was that of a person of the name of Bury, in the county of Devon, whose wife had been divorced from him, on the ground of impotency; and who afterwards married Sir George Carey, of the same county. That case will be fully stated, though it is has not been thought requisite to notice every case, in which illegitimacy has been alleged, in consequence of the *impotency* of the husband.

[1] In the College of Arms.

[2] It is said in Nash's *History of Worcestershire* (Vol. I., p. 54), that on the complaint of William Nanfan, as heir-at-law of Sir George Cornwall, the Earl Marshal ordered the Heralds to make a proclamation of Humphrey Cornwall's real birth at the visitation of the Counties of Worcester and Hereford in 1569. If this proceeding did occur, it could have had no effect on his legal status; and it appears that those Heralds, or their successors, were subsequently convinced of his legitimacy.

Case of Bury *v.* Webber, 40 Eliz. 1598.

The particulars of this affair, as stated by a topographical writer[1], impart some interest to the report of the legal points involved in the decision. "John Bury, of Colleton, married first Thomasine, daughter and heir of John Giffard, of Yeo, from whom he was divorced; and she re-married unto Sir George Carey. His brother Hugh, abusing his simplicity, enjoyed the profits of his land, and kept him as a prisoner, and wastefully consumed, and sold the land; but John, having stolen from his brother, secretly married one Mongey's daughter, and had issue, Humfrey, which was secretly brought up from the knowledge of Hugh Bury; which Humfrey, when he came to full age, sued for the land, and after much trouble concerning the validity of the divorce betwixt his father and his first wife, at length recovered back all the land which was sold by his uncle Hugh."

The case was tried in Michaelmas Term, 40 & 41 Eliz., November 1598, in the Common Pleas, and is thus reported by Lord Coke. "Between Webber and Bury, in an "ejectio firmæ," a special verdict was given on a divorce between Bury and his wife, 'causâ frigiditatis,' and that the wife for three years after the marriage, 'remansit virgo intacta propter perpetuam impotentiam generationis in viro, et quod vir fuit inaptus ad generandum.' And in this special verdict all the examinations of the witnesses, on which the Judge in the Spiritual Court was moved to give his sentence, and which were deposed in the same case, by which the perpetual infirmity and disability of Bury 'ad generandum,' was manifest (which were not entered in a former verdict, on which judgment was given,) by which it was pretended, that by reason of his perpetual impotency, the issue which he had by the second wife was illegitimate; and that was the doubt in this cause which the Jury con-

[1] Sir William Pole's "*Collections towards a Description of the County of Devon*," p. 433.

Case of Bury *v.* Webber, 40 Eliz. 1598.

ceived: and it was adjudged that the issue by the second wife was legitimate; for it is clear that by the divorce, 'causâ frigiditatis,' the marriage was dissolved, 'a vinculo matrimonii,' and by consequence each of them might marry again. Then admitting the second marriage was voidable, yet it remains a marriage until it be dissolved; and by consequence the issue, which is had during the coverture, if no divorce be in the life of the parties, is lawful. See 36 Ass. 10; 39 E. 3, 32; 28 H. 8; Bastardy, 44. Bracton, lib. 2, fol. 29; 12 H. 7, 22; 22 E. 4, Consultation 35, 'et semper presumitur pro legitimatione puerorum, et filiatio non potest probari:' Also a man may be 'habilis et inhabilis diversis temporibus;' and, therefore (notwithstanding the depositions by which a natural and perpetual inability before the first sentence was deposed,) judgment was given that the issue was lawful, according to the first judgment given; and on this judgment a writ of error was brought, and after many arguments, and great deliberation, the said judgment was affirmed by Popham, Chief Justice, and the whole Court, for the reasons and causes aforesaid[1]."

[1] 5 *Co.* 99; 1 *Anderson*, 185. This Case is thus noticed by Chief Justice Dyer, in reference to a divorce, which had been obtained about the same time, by the daughter of Sir Richard Lee, from her husband, a Mr. Sabell, for impotency:—Simile judicium in eodem anno, vel anno proximo sequente, fuit done versus Bury in comit. Devon, ad sectam uxoris suæ, et la feme nupta fuit Cary, per que el aver issue, et done tout sa inheritance a Cary, sa second baron. Et Bury auxy fuit marry a un autre feme de que il avoit issue, ut asseritur; et in cest case l'oppinion des Doctors est, que donques les persons seront compell de communer et cohabiter, ut vir et uxor, eo quod Sancta Ecclesia decepta fuit in priori judicio et ideo grand suit fuit fait de staier l'engrossing del fine, sed post unum terminum fuit ingros per mandatum des Justices, contra mandatum custodis magni sigilli.—*Dyer* also notices the case of *Stafford* v. *Mongy*, in the 37 Eliz., in which a man, who had been divorced from his wife for impotency, had married again, and had issue by his second wife, but the second marriage was held to be void, for the civilians considered, "qui aptus est ad unam, aptus est ad aliam, et quando potentia reducitur ad actum debet redire ad primas nuptias."—*Ex lib. Mr. Tho. Tempest.* It is also stated that, "impotentia et

Case of Done and Egerton *v.* Hinton and Starkey, 14 Jaq. I. 1617.

The earliest case of Adulterine Bastardy in the reign of James the First, is that of *Done and Egerton* v. *Hinton and Starkey*; and though no regular report of it has been found, it is evident from the manner in which it is cited by Chief Justice Rolle, that the law on the subject had then undergone no change. In Hilary Term 14 Jac. I. a cause was tried in the Star Chamber, in which Done and Egerton were plaintiffs, and two Hintons and Starkey defendants, before the Lord Chancellor Ellesmere, Sir Henry Montague, Chief Justice of the King's Bench, and Sir Henry Hobart, Chief Justice of the Common Pleas[1]. The question at issue is not stated, but the following points appear to have been discussed, and decided. It was held by the Chancellor, and the Chief Justice of the King's Bench, against the opinion of Hobart, that "if a husband be castrated, so that it is apparent that he cannot, by any possibility, beget issue, and if divers years afterwards his wife has issue, it shall be a bastard, although it was begot within marriage; because it is evident that it cannot be legitimate." On the same occasion, the Judges and the Chancellor were unanimously of opinion that, "if a married woman has issue in adultery, still, if the husband be able to beget issue, and is *within the four seas*, it is not a bastard." It was then also agreed *per curiam*, "that if a woman elopes and lives in adultery with another, and during that time the issue is born in adultery, still it is a *mulier* by our law;" "but

frigiditas quod ad hanc est causa sufficient divorce apres l'exploration et tryal per trois ans et autre ceremonies injoyne per Canons, et le second marriage d'ambideux est bone, nient obstant que le party impotent aver children." *Harrison's Reading*, Lent 1632. *Carr et Essex*'s case contr' a cest jour per Seignior de Windsore, is likewise referred to. *Dyer's Reports*, 179.

[1] *Rolle's Abridgment*, I. p. 358. Much trouble has been taken to find a fuller report of this case, or some record of the proceedings, but without success.

Case of Done and Egerton *v.* Hinton and Starkey, 14 Jaq. I. 1617.

the husband must be within the four seas, otherwise the issue is a bastard." The same Judges likewise ruled, that, "if the wife of a man who had been beyond the sea for such time, before the birth of the issue which the wife had in his absence, that the issue could not be his, it is a bastard [1]."

This case shows, that it was then held by the Judges, that the presumption of legitimacy of children born during coverture, could only be rebutted by evidence of divorce, impotence, or absence from the realm, at the time when the child was begotten; and hence, that the principle of the "four seas" was still in full operation.

Case of Alsop *v.* Bowtrell, 17 Jac I. 1619.

In Michaelmas Term, 17 Jac. I., the case of *Alsop* v. *Bowtrell* was tried, in which the question was, whether one Edmund Andrews, who died on the 23rd of March 1610, leaving his wife privement enceinte, but who was not delivered until the 5th [2] of January 1611 (being forty weeks and nine days), and who then gave birth to a daughter, named Elizabeth, shall be reputed the father of the said child, or that she was a bastard? It was proved that "Edmund Andrews, father of the said Edmund who was dead, had, out of malice to his son's wife, much abused, and caused her to be dislodged from places where she was harboured, and to lie in the cold streets; and that she was so treated for six weeks together before her travail [3];" but being taken into the house of a woman, who commiserated her situation, and having warmth and sustenance administered to her, she was delivered, within twenty-four hours afterwards, of the said Elizabeth." These facts being proved, five women of good credence, and two doctors of physic [4], affirmed upon their

[1] *Rolle's Abridgment*, I., 358.

[2] 9th of January in *Rolle's Abridgment*, I., 356.

[3] She was in travail six weeks before she was delivered.—*Ibid.*

[4] Doctors Paddy and Mumford.—*Ibid.*

Case of Alsop *v.* Bowtrell, 17 Jac. 1619.

oaths, that the child came in time convenient to be the daughter of the husband who died; that the usual period for a woman to go with child, was nine months and ten days, viz. menses solares, that is, thirty days to the month, and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, namely, to the end of ten months or more, as both ancient and modern authors and experience proved. The Court held that it might well be as the physicians had affirmed, and that ten months may be said, properly, to be the time, mulieribus pariendo constitutum. Against this a record was produced, Trin. 18 Edw. I. Rot. 13. (*Radwell*'s case[1]) in this Court, that because a woman went eleven months after the death of her husband, it was resolved that the issue was not legitimate, being born post ultimum tempus mulieribus pariendo constitutum; but note, that it is not there shown what was ultimum tempus pariendo mulieribus constitutum; and the physicians further affirmed that a perfect birth may be at seven months, according to the strength of the mother, or of the child himself, which is as long before the time of the proper birth; and for the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind. The Court thereupon told the Jury that the said Elizabeth, who was born forty weeks and more after the death of the said Edmund, might well be his daughter[2]."

[1] *Vide* p. 32 antea.

[2] *Cro. Jaq.* 541. The Court in this, as in most other instances, acted upon the principle alluded to by Judge Dodderidge a few years before, that "the best shall be presumed, and this shall be for the legitimation of the heir, and so, he observed, it was said in *Burgess*'s case, 'Quod semper præsumitur pro legitimatione puerorum.'" *Harris* v. *Austen*, in 13 Jaq., 3 *Bulstrode*, 42. *Burgess*'s case has not been found. On the trial of Alsop and Bowtrell, a man midwife stated on oath, that he had known a woman to be delivered of a child, and two weeks afterwards to be delivered of another,

Thecar's Case, 4 Car. I. 1628.

A case of disputed legitimacy, which happened in the 4th Car. I., is of considerable importance. A man of the name of John Thecar, died seised of lands held in capite of the Crown; and according to two inquisitions, one taken by the escheator virtute officii, and the other virtute brevis, it was found that Ann Posthuma Thecar, who was born two hundred and eighty-one days and sixteen hours after his decease[1], was his daughter and heiress. His brother endeavoured to traverse the inquisitions, on the ground that the child was not Thecar's, but was begotten by one Duncomb, with whom the wife had cohabited before her husband's death, and whom she married only six days after his decease. It was also alleged, that Thecar had been induced to marry this woman during his minority, without the consent of his friends, and that he was incapable of procreation for six months before he died. The case was very elaborately argued in the Common Pleas, in Michaelmas Term 1628; and it was said by the Counsel, who insisted that it was not the child of Thecar, that it had been proved, that by no possibility of nature could Thecar have begotten a child for six months before his decease; and Bracton and the Fleta were cited to show, that where the issue is born during espousals, no regular inquiry could be made whether it was the husband's (Duncomb) child, if he was within the four seas, unless it be imperfectio legitima by infirmity, &c.; that the issue may not be the true heir of the husband, but "est hæres quem nuptiæ demonstrant;" and that here there was proof to the contrary, and proof exceeds presump-

and the physicians gave their opinions, that nature was rapid or tardy, according to the nutriment of the mother.—*Rolle's Abridgment*, I., 356.

[1] The Reports state, loosely, that the husband died in January, and that the child was born on the 21st of July following. The exact period mentioned in the text, is taken from Lord Hale's Note on this case in Hargrave's edition of Coke's *First Institute*.

Thecar's Case, 4 Car. I. 1628.

tion; therefore this child was the child of Duncomb, and so ought to be considered. He cited the case 21 Edw. III.[1], which he said made strongly for him, and the book intituled "Terms of the Law[2]," and other authorities, to prove that an infant might be born in six months. It was contended, by the other side, that the child could not be Duncomb's, because it had been found by ventre inspiciendo, at the death of Thecar, that his widow had then been pregnant twenty weeks, and expected to be delivered within twenty weeks following, and that she was accordingly delivered in twenty-two weeks; that the appearance of the infant proved that it could not be a seven months' child, and therefore that it could not be Duncomb's; that two inquisitions had found that it was the heir of Thecar; and that as it was born six months after the marriage with Duncomb, it must either be Thecar's, or a bastard; and that a traverse could not be admitted when a true (loyal) heir was found. Finch, Recorder of London, observed, "it cannot be a bastard in any way, for it is born after marriage." No decision is mentioned in the report of this case by Littleton, Winchcomb, or Croke[3]; but according to Lord Hale's MS. note, the question was tried by a jury, and the child was found to be the issue of Thecar. The same note states that it was agreed, 1st, That if the

[1] *Vide* p. 34 antea.

[2] The *Terms of the Law*, which was first published in 1563, contains little on the subject of this inquiry, the following being the only passages which bear upon it. "If a woman bee great with childe with her husbande, and her husbande dyeth, and shee take another husbande, and after the childe is borne, than the chylde shalbee saide the chylde of the furste husbande. But if she were pryvilye with childe at the tyme of y^e^ death of her furst husband, then hee shalbe saide the chylde of the seconde husband. Also if a manne take a wife whiche is great with childe withe another that was not her husbande, and after the childe is born within y^e^ espousels, than he shall bee saide the childe of y^e^ husbande, thoughe it were born but one day after the espouselz solempnisat." Ed. 1567, f. 18^b^.

[3] *Littleton*, 177; *Cro. Jaq.*, 685; *Winchcomb*, 71.

Thecar's Case, 4 Car. I. 1628.

woman had not married Duncomb, the child would, without question, not be a bastard, but would be adjudged the child of Thecar; 2nd, That no averment shall be received that Thecar did not cohabit with his wife; 3rd, That though it was possible, that the son [daughter] might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son [daughter] was found to be the issue of Thecar[1]. This case shows that the strong presumption that the child was begotten by the second husband, arising from the non-access of the first husband for a long time before his death, during which time he was incapable of procreation, the suspicion that the mother had an adulterous connection with Duncomb, her marrying him with indecent haste immediately after her husband's decease, and the possibility that the conception, as well as the birth, took place subsequent to the second marriage, were insufficient to prove that the infant was not, by law, the child of Thecar. The first husband was within the four seas; and the averment that he was impotent when the infant was begotten, (supposing that it had attained its full time when it was born) was not received. The rule of law was imperative, and could not be relaxed upon probabilities, however strong; or upon circumstantial evidence, even though that evidence amounted, as in this case, almost to positive proof.

Coke's First Institute, 1628.

Before proceeding with the cases in which the law of Adulterine Bastardy has been mooted, it must be observed, that Lord Coke's First Institute was published about the year when *Thecar*'s case was decided; and the inquiry into the Law on the subject, at the accession of Charles the First, is of interest to the legal profession, because it is intimately connected with the reputation of the most profoundly learned writer on

[1] Hargrave's Note, 1 *Inst.*, 123 [b]. *See* Thomas's edition, 1 *Inst.*, vol. I., p. 141.

Jurisprudence, which England has produced, whose definition of the law of legitimacy has been impeached by grave authority, as "*not being the law of England, but a certain law laid down by Lord Coke,*" as "*not* being *borne out by the authority referred to,*" and as "being *inconsistent* with the earlier and later decisions[1]."

Coke's First Institute, 1628.

In the First Institute, which was originally published in 1628, Lord Coke says:

"But we term them all by the name of Bastard that be born out of lawful marriage. By the Common Law, if the husband be within the four seas, that is, within the jurisdiction of the King of England, if the wife hath issue, no proof is to be admitted to prove the child a bastard, (for in that case, *filiatio non potest probari*) unless the husband hath an apparent impossibility of procreation; as if the husband be but eight years old, or under the age of procreation, such issue is a Bastard, albeit he be born within marriage. But if the issue be born within a month or a day after marriage, between parties of full lawful age, the child is legitimate[2]."

[1] Lord Redesdale's Speech on the Banbury Claim, in 1813.—*Le Marchant*'s Report of the *Gardner* Case, Appendix, p. 437. *Vide postea.*

[2] *First Institute*, 244[a]. The following are the authorities cited by Lord Coke, in the first edition of that work, for the statement, all of which have been noticed in the preceding pages of this work: *Bracton*, lib. 4, pp. 278, 279; Y. B. 7 Hen IV., 9; 39 Edw. III., 13; 41 Edw. III., 7; 43 Edw. III., 19; 44 Edw. III., 10; 29 Ass. 54; 98 Ass. 24; 1 Hen. VI., 7; 18 Edw. IV., 28 and 30. In a MS. note to this edition of the *First Institute*, in the British Museum, the proverb of "the cow and the calf" is thus added, as an illustration of the passage, "For whose the cow is (as it is commonly said) his is the calf also." Mr. (now Chief Justice) Tindal observed on this dictum of Lord Coke, when counsel in the *Gardner* case, "In the time when Lord Coke wrote, it is clear that the Common Law still adhered to the same mode of determining the question, namely, the single point whether possible or impossible; not indeed *whether possible on account of the husband being within the four seas, the negation of which was only an example of impossibility, and put upon the books to show the extent to which such impossibility was carried,* but whether there was an actual *impossibility,* by the separation of the parties, which prevented the one from bearing, or the other from procreating, or whether for any other

Coke's First Institute, 1628.

In another part of the same work, when noticing presumptions of Law, Lord Coke repeats that doctrine:

"So if a man be within the four seas, and his wife hath a child, the law presumeth that it is the child of the husband, and against this presumption the law will admit no proof[1]."

Fourth Institute.

Nor was this dictum confined to the First Institute. It again occurs, in the following words, in the Fourth Institute, where, speaking of the power of Parliament, Lord Coke says, "It may bastard a child that by law is legitimate, viz., begotten by an adulterer, the husband being within the four seas[2]."

Seventh Report.

In Coke's Report of the case of *Kenn*, in the 4th Jaq. I., a similar statement is made:—"A man may be a bastard in the Temporal Law, and mulier in the Spiritual Law, and e converso. As a man who is begotten in adultery during the coverture, is mulier by the Temporal Law, and bastard by the Spiritual Law[3]."

When the legal knowledge of Lord Coke, and the fact that he was, for a long time, either Chief Justice of the Common Pleas, or Chief Justice of England, are considered, it must appear extremely improbable, that he should venture to lay down the law of Adulterine Bastardy in this manner, to allow the statement to remain unaltered in the different editions of the First Institute, which he revised, and to repeat it in the Fourth Institute, if such was not generally known, and universally admitted to be, sound and undoubted Law by the profession. Lord Coke's labours were criticised with un-

impossibility which the mind may suggest to itself, arising from that which the law calls a non-access, for the purpose of procreating children."—*Le Marchant*, Report of the *Gardner* Case, pp. 230, 231.

[1] *First Inst.* 373.

[2] *Fourth Institute*, p. 36, the *Marquis of Winchester*'s case, in Rot. Parl. 5 & 6 Edw. VI., is cited by mistake for the case of the *Marquis of Northampton*. Vide p. 59, antea.

[3] 7 *Report*, 43.

sparing severity; but no lawyer of his times ventured to impugn his definition of the Law on this subject. He referred to the authorities upon which his statement was founded; and it is confidently submitted, that those authorities afford conclusive evidence that such was the Law of England, from the reign of Edward the First, if not from a much earlier epoch, to the period when Coke lived. Independent of the authorities in the Year Books, and the declarations in Acts of Parliament, the law had been so ruled on various occasions in Coke's own time, and probably in his presence, either as Counsel or as Judge. Lord Coke certainly did not "*make*" that law; nor did he presume to strain or alter it, to suit his own theories, or his own prejudices. As he found the Law, so he described it. He adopted the language of preceding writers. He used nearly the *ipsissima verba* of the Year Books; and proofs will be adduced, that succeeding Judges for nearly a century after his decease, administered the Law according to his definition of it, not because that definition was the *earliest*, or the *only* authority, but because it embodied, in few words, what the Courts had, during many ages, ruled to be Law. To say therefore that Lord Coke "made" that law; or indeed that he was the author of the definition which he has given of it, was at variance with the truth.

Lord Coke.

Although the principle of refusing evidence of non-access, if the husband was within the realm, is now exploded, the cause of its having fallen into desuetude, did not arise from any doubt of the correctness of Lord Coke's definition, but from the absurdity and injustice which that principle was presumed to involve. It was, therefore, scarcely to be expected that a noble Lord of great legal learning, who had filled one of the highest judicial offices, would venture to say that the law thus laid down by Lord Coke, was "not the law of

Lord Coke.

England, but a certain law laid down by Lord Coke in his Commentary on the Institutes; that he was too fond of making the law instead of declaring the law; and of telling untruths to support his own opinions; that an obstinate persistence in any opinion he had embraced, was a leading defect in his character; and that Mr. Hargrave had shewn that that statement of the law is not borne out by the authority referred to by the text, and was inconsistent with the earlier and later decisions[1]." With "later" decisions Coke's definition had nothing to do. He could not anticipate what would be the conduct of future Judges, or how far they might refuse to be governed by precedents, and allow considerations of convenience, to supersede a rule of law which had been established by an uninterrupted series of decisions, for nearly five hundred years. That Coke's statement, so far from being at variance with, was founded upon "earlier" decisions, is unquestionable.

It is to be particularly observed that Lord Coke is not the only one of his contemporaries, in whose works this definition of the Law is to be found; for there is not a single legal writer of the period, who does not express himself to the same effect, and in nearly the same words. In the numerous abridgments of the Law which appeared before Coke wrote, including those of Fitz-Herbert and Brooke, the Law is stated in the words of the cases in the Year Books, to which he refers as his authority; and those statements are repeated in the Abridgments of Rolle[2], Shepherd[3] and Danvers[4], which appeared towards the close of the seventeenth, or early in the eighteenth century. Serjeant Rolle (who became a

[1] Lord Redesdale's Speech on the Claim to the Earldom of Banbury.—*Le Marchant*'s Report of the *Gardner* Case. *Vide postea.*

[2] Printed in 1668, under the superintendence of Sir Matthew Hale.

[3] Ed. 1675.

[4] Ed. 1705.

Justice of the King's Bench in 1645, and who was Chief Justice of England from 1648 to 1655,) appears to have paid great attention to the subject, as some of the most important cases are only to be found in his work; and nowhere is the law more strongly laid down, that a child of a married woman could not be bastardized, if the husband was within the four seas, except he were impotent, or divorced from his wife.

Coke's First Institute, 1628.

In the second edition of a Treatise on the Common Law, by Sir Henry Finch, which was published in 1627, it is said: "He that is begotten out of marriage is called a Bastard; for if a woman great with child take a husband, the issue born (though it be within six weeks after) is no bastard: or if the wife elope from her husband, and continue in adultery, yet the issue born during that time (if both be within the four seas) is intended lawfully begotten. And if one die, his wife privement enceinte, (that is, so with child as it is not discerned) and she take another husband, the issue born within a month (or such a time as it is impossible he should beget it) shall be accounted the son of her first husband; and such a bastard is of blood to none; in law, nullius filius[1]."

Finch's Law, 1627.

In a Treatise on the Civil and Ecclesiastical Law, by Sir Thomas Ridley, Doctor of Civil Law, which was published in 1607, (more than *twenty years before* the First Institute appeared) and the second edition of which Treatise was printed in 1634[2], the author says, "Of Bastards, some are begot and born of single women, (in which rank also I put widows) some other of married women. Those which were begotten of married women were called *nothi*, because they seemed to be his children whom the marriage doth show, but are not, no otherwise than

Ridley's Civil and Ecclesiastical Law, 1607 and 1634.

[1] *Finch's Law*, p. 127. The passage remained unaltered in all the subsequent editions.

[2] The passage occurs *verbatim* in both editions.

Ridley's Civil and Ecclesiastical Law, 1607 and 1634.

some fevers are called *nothæ*, that is, bastard fevers, because they imitate the tertian or quartan fever in heat, and other accidents, but yet are neither tertians nor quartans, as the learned physicians well know. But these are counted so to be Bastards, if either the husband were so long absent from his wife, as by *no possibility of nature* the child could be his, or that the adulterer and adulteress were so known to keep company together, as that by just account of time, it could not fall out to be any other man's child but the adulterer's himself; and yet, in these very cases within this realm, unless the husband be all the time of the impossibility beyond the seas, the rule of the law holds true, 'pater est quem nuptiæ demonstrant[1].'"

Banbury Case, 1660–1.

No reported case of legitimacy, except perhaps that of *Hospell* and *Collins*, which will be particularly noticed hereafter, has been found after this period, until the proceedings on the claim to the Earldom of Banbury in 1661; and as a full report of that case will be found in another part of this volume, it will only be here observed, that according to the very imperfect notes of the proceedings before the Lords' Committees for Privileges in that year, the Counsel for the claimant cited Lord Coke's First Institute, 244: "Not to be disputed whether son or no, if father be within the four seas, though wife be in adultery;" that the Attorney-general, on the part of the Crown, "*confessed the law clear*;" and that the Committee reported to the House of Lords that, "according to the law of the land, he [the claimant] is legitimate." The report presented on the 7th of July 1661 was, that "Nicholas, Earl of Banbury, is a legitimate person;" but the House of Lords refused to adopt that report, and heard evidence and arguments before the

[1] *Ibid*, Ed. 1634, pp 243. 244.

whole House; after which it again referred the matter to the Committee; and the Committee a *second time* reported in favour of the claimant's legitimacy. The opponents of the claim being, however, determined to resist it, the House proposed to bastardize the claimant by an Act of Parliament, which is merely alluded to, in this place, on account of the declaration which it contains, of what was considered to be law, at the very time when those proceedings were instituted. The Bill, which never proceeded beyond the first reading in the House of Lords, stated, "that *the illegitimation of children born in wedlock can no way be declared but by Act of Parliament.*" It then stated, "that the said Nicholas shall be declared and enacted to be illegitimate to all intents and purposes whatsoever, and to be incapable and disabled to inherit any of the honours and dignities, or any other honours, manors, lands, tenements or hereditaments, as heir, or heir male of the body of William Earl of Banbury."

Banbury Case, 1660–1.

The only inferences of which this Bill admits, are that the individual whom it concerned was legitimate; that he could only be rendered illegitimate by an Act of the Legislature; and that, in no other way, could a child, who was born during coverture, be bastardized, except the husband was separated from his wife by sentence of divorce, was impotent, or was absent from the realm, at the time of its conception. In the *Banbury* case, up to the period when the Bill was introduced, the Counsel for the claimant, the Attorney-general, and the Lords' Committee, acted upon the Law, as it was then universally understood. From a strong feeling, that though the claimant was *de jure,* he was not *de facto,* the child of the Earl of Banbury, the majority of the Lords determined, that he should not succeed to the inheritance of the person, who, according to the law of

Banbury Case, 1660-1.

the land, was his father; and following a few precedents in the worst period of English history, their Lordships determined to render him illegitimate by an Act of Parliament. Whether just or unjust, it is undeniable that such a measure would have been *legal*; and notwithstanding the prejudice which existed against the claimant, no attempt was made to effect so important a change in his status, by warping the existing law for that purpose.

If the Bill had been proceeded with, the claimant and his descendants might have complained of being harshly and severely treated; but they would at least have been disinherited by the law of the land. Although a right of inheritance has been withheld from them by a majority of the House of Lords, those rights have always been acknowledged by a large body of the House itself; and the Judges seem, until the present century, to have been fully impressed with the legal justice of the claim.

Ibid, 1693.

In January 1693, when the claim was renewed, it was proposed that "all the Judges be heard such question as shall be asked relating to the points in law in this case;" but the motion was negatived by the votes of thirty-eight to twenty-nine Peers. That the proposition was made by those Peers who supported the claim, is shown by the parties who voted for referring to the Judges, being the identical Peers who voted in favour of the claimant's right. Their confidence in the justice of the claim, is therefore most satisfactorily shown by their wishing to consult the Judges; and no other conclusion can be drawn from the refusal of the majority of the Lords than that they were conscious, that the opinion of those learned persons would be inconsistent with their Lordships' wishes and intentions.

This is not the place to comment upon the extraordinary fact, that on a question of law, involving

the most important rights of a subject, a Court, composed almost entirely of laymen, should have pertinaciously refused the wish of no less than twenty-nine members of its own body, to consult the Judges, whom the Constitution has expressly assigned to the House for its assistance and guidance on points of law. That the twenty-nine dissentient Peers should ask leave to protest, and desire thus to prove to posterity that they, at least, were no party to so objectionable a proceeding, marks the strong feeling which they entertained upon the subject.

Banbury Case, 1693.

A curious case of adulterine bastardy happened about the time when the Banbury question was agitated. John Manners Lord Roos, son and heir apparent of the Earl of Rutland, married, in 1658, Anne Pierrepoint, eldest daughter of the Marquess of Dorchester, by whom he had a daughter, who died an infant in February 1659, [query, 1660.] He then travelled abroad, and during his absence, his wife formed an illicit intercourse with some other person[1], by whom she had a child, who is described in the subsequent proceedings, by the appellation of "Ignotus." On the 19th of April 1662, a Bill was read a first time in the House of Lords, entitled "An Act for illegitimating of the child named Ignotus, born of the body of the Lady Anne Roos;" and on the question being put, whether this Bill shall be rejected? it was resolved in the negative. It was read a second time on the 21st of that month, when the House ordered, that the cause concerning Anne Lady Roos, wife of John Lord Roos, upon a Bill and petition depending before it, should be heard on the 6th of May by Counsel on both sides, and that she should have free liberty to go in and out in safety, in looking after her business, whilst the cause was pending. Four

Case of Lady Roos, 18 Car. II. 1666.

[1] *Collins's Peerage*, Ed. 1779. Vol. V. p. 412.

Case of Lady Roos, 18 Car. II. 1666.

Counsel were assigned to her ; and copies of the petition were directed to be given to the Marquess of Dorchester, and the Earl of Rutland, if they pleased. The matter was postponed to the 7th of May, on which day it was put off, "in regard of the great and public affairs of the kingdom," until the first Thursday after the next meeting after the recess[1]. Nothing further, however, took place until the year 1666; when Lord Roos is said to have obtained a divorce from the Ecclesiastical Court; and in October in that year a Bill for the illegitimation of the children of Lady Anne Roos " was brought into the House of Lords, and read a first time[2]. The Bill was read a second time on the 24th of October, when it was ordered to be taken into serious consideration on the 14th of November, on its commitment, at which time Lady Roos might be heard; and notice was to be given to her for that purpose[3]. On the appointed day, it was said that she was in Ireland, and the House proceeded to the commitment of the Bill[4]. On the 10th of December all the Judges, or any three of them, and Sir William Turner and Sir Walter Walker, Doctors of the Civil Law, were directed to attend the Committee to whom the Bill was committed[5]. The Committee did not make their report until the 5th of January 1667 ; and it is to be regretted that its proceedings have not been preserved, because the opinions, which the civilians and common law Judges gave to the Committee, would have shown what was then considered to be law, on the subject of Adulterine Bastardy. The Committee stated that they had made some alterations and amendments in the Bill, and had added a proviso, concerning the claim of the Duke of

[1] *Lords' Journals,* XI. 433, 434, 445, 450.

[2] *Ibid.* XII. 15.

[3] *Ibid.* XII. 17.

[4] *Ibid.* p. 28.

[5] *Ibid.* p. 43.

Case of Lady Roos, 18 Car. II. 1666.

Buckingham to the title of Lord Roos[1]. The Bill was fully discussed on the following day, when the House agreed to the alterations; and Lady Roos was ordered to be served with notice to attend on the 11th. On that day witnesses were examined, and counsel heard at the bar[2]; and the House adopted a course, which had certainly the merit of being the most direct mode of arriving at the fact, but which was at variance with the first principles of evidence. Lord Roos was *himself* permitted, at his own request, to state upon oath that "since the 4th of March 1659[3], and several months before, he had no carnal knowledge of his wife, the Lady Anne Roos." With this statement the House, it is said, "being satisfied concerning the truth of the matter-of-fact contained in the said Bill, ordered it to be engrossed," and it was read a third time on the ensuing day[4]. The assent of the Commons was signified to the Lords on the 29th of January; and it received the Royal assent on the 8th of the following February[5]. The Bill, which proceeded on a petition from the Earl of Rutland and his son Lord Roos, stated, "That whereas the Lady Anne, wife of your subject, John Lord Roos, did wilfully, maliciously, and contrary to her husband's express command, go from his house March the 4th, 1659, and, abandoning all honour and virtue, professed not to love her husband, frequented light, loose company in an impudent, infamous, and lascivious way, and did wilfully and obstinately depart and elope from her said husband, living in the said time of her elopement in notorious adultery, and in the time of her adulterous and lewd living, she hath brought forth two male children, the first baptized by the name of Ignotus,

[1] *Lords' Journals*, p. 67.
[2] *Ibid.* p. 68.
[3] Probably the 4th of March 1659–1660.
[4] *Lords' Journals*, XII. p. 71.
[5] *Ibid.* p 95. 110.

Case of Lady Roos, 18 Car. II. 1666.

and the second said to be baptized by the name of Charles, for which adultery, clearly proved in the Court of Arches, sentence of divorce is passed in the said Court, to divorce the said John Lord Roos and the Lady Anne; since which divorce the Lady Anne, continuing in her vicious and abominable way of living, hath brought forth another male child, born of her at West Chester, said to be baptized by the name of Henry, the which children, thus notoriously begotten in adultery, by the laws of this your realm, are or may be accounted legitimate, and may inherit the honours, manors, lands, tenements, and hereditaments of the said John Earl of Rutland and John Lord Roos, that shall be left to descend, to their high discomfort, sorrow of their relations, the great scandal to all worthy women, and emboldening of all such like graceless, wicked wives; for reformation whereof, let it please your most excellent Majesty, out of your princely goodness and compassion to their misfortune, and according to the examples of your royal predecessors, in the like case, that it may be enacted," &c. " that the said three children, born of the body of the said Lady Anne, called Ignotus, Charles and Henry, or by what names soever they be called or known, be, are, and shall be hereby deemed, adjudged, accepted and taken to be bastards, and illegimate, to all intents and purposes whatsoever, from their several births; and be and each and every of them, and all descending or coming, or which shall descend or come from them, or any of them, is and are hereby, from time to time, disabled, made incapable, and clearly barred to inherit any honours, manors, lands, tenements or other hereditaments as heir or heirs of the said John Earl of Rutland, or of the said John Lord Roos, or of any person or persons whatsoever, or as heir male or heirs male of the body of the said John Earl of Rutland, or the body of

the said John Lord Roos, or of either of them, by any means whatsoever[1]," &c.

Case of Lady Roos, 18 Car. II. 1666.

In March 1669–1670, a Bill was brought in to enable Lord Roos to marry again, which was opposed by his wife, who appeared against it at the bar of the House of Lords in person[2]; and the question was made a political one, from its being supposed that the Bill would form a precedent for divorcing the King and Queen. After being vigorously resisted by the Duke of York, and the Peers of his party, against those who adhered to the Court, it was, however, passed; the Duke and thirty-three other Peers, having protested against the measure[3].

As the proceedings of the Committee to which the Bill for illegitimating Lady Roos's children was referred, are not extant, it is impossible to state what opinions were given by the Judges and Civilians on the law of the case; but the facts admit of no other inference, than that those learned persons considered the Bill in-

[1] The Bill then proceeds to disable any other children that might be afterwards born of Lady Roos, from inheriting any lands or honours of her husband's family. But it is provided that "this Act, nor anything herein contained, shall [*query* not] be construed to debar or hinder the said children from having or claiming any manors, lands, tenements or hereditaments, which are descended or come to the said Lady Anne, in possession, reversion, remainder or expectancy, as one of the co-heirs of Paul, late Viscount Banning." The last clause prevents the attribution of the title of Lord Roos, in the Act, from being prejudicial to the claim of the Duke of Buckingham to that title.

[2] *Lords' Journals*, XII. pp. 300. 306. 311. 316. 322.

[3] *Lords' Journals*, XII. 310. 329. *Burnet's History of his own Time*, vol. II. p. 367; vol. III. p. 175. Evelyn says, "22nd March, I went to Westminster, where, in the House of Lords, I saw his Majesty on his throne, but without his robes, all the peers sitting with their hats on, the business of the day being the divorce of my Lord Roos. Such an occasion and sight had not been seen in England since the time of Henry VIII."—*Memoirs*, vol. II. p 320. Nothing, however, is said in the Journals to have taken place on the subject on the day mentioned by Evelyn, though the King was then present. The date should perhaps be the 21th of that month.—*Journals*, XII. pp 322, 323.

Case of Lady Roos, 18 Car. II. 1666.

dispensable for the object in view. Unless the old rule, that the legitimacy of children born of a married woman could not be impeached, except for the special matter so often mentioned, was then considered Law, and was so stated to the Committee, it is extremely unlikely that the Bill would have been proceeded with. The measure was by no means popular; and if the children could have been rendered illegitimate by a trial at Common Law, there is every reason for supposing that that course would have been preferred.

It appears from the preamble to the Bill, that Lady Roos quitted her husband's house on the 4th of March 1659–1660, and after her elopement "lived in notorious adultery in an impudent and lascivious way;" that "in the time of her adulterous and lewd living" she had given birth to two children; that on proof of her adultery before the Ecclesiastical Court, sentence of divorce had been passed; and that since her divorce she had been delivered of another child. Yet, notwithstanding these facts, it was evidently the opinion of the lawyers of the day, that two, at least, of her children were legitimate; and that they could only be disabled from inheriting her husband's lands and honours by an Act of Parliament.

Purbeck Case, 18 Jac. I. to 30 Car. II. 1620 to 1678.

The next case which occurred commenced about the year 1620, and continued until 1678; and the facts are so remarkable, and involve points of so much interest, that they will, for the first time, be fully stated.

Sir John Villiers, eldest brother of the celebrated royal favourite, George Duke of Buckingham, was created Baron of Stoke, in the county of Buckingham, and Viscount of Purbeck, in the county of Dorset, to hold to him, and the heirs male of his body, by patent, dated on the 19th June, 17 Jaq. I., 1619. He married first, about the year 1618, Frances, daughter of Lord Chief

Purbeck Case, 18 Jaq. I. 1620.

Justice Coke; and the circumstances connected with that unfortunate alliance are, from various causes, almost matter of history. Not long after their marriage, she quitted her husband[1], pretended to be the wife of John Wright, and cohabited with Sir Robert Howard, by whom it was supposed she had a son, who was born during her separation from her husband, and was baptized by the name of Robert Wright.

Proceedings were instituted against her for adultery in the Court of High Commission, which sentenced her to do penance in the Savoy Church for adultery[2]; but she fled, and lived privately with her father at Stoke, until his death in 1634. Towards the end of that year, she took lodgings near the Archbishop of Canterbury's Palace at Lambeth, and in March 1635 was arrested and committed to the Gate House at Westminster by the Privy Council; and her paramour, Sir Robert Howard, was at the same time sent to the Fleet, though no sentence had been pronounced against him[3]. Lady Purbeck soon afterwards escaped from confinement, but Howard was ordered to remain in prison until he produced her; and a contemporary observes, that as he was in the Fleet he could not do so, "for he sees nobody; and if he were out, would not do it; so that he is miserable, and like to pay dear for his unlawful pleasures[4]." In June, however, Howard was released on giving a bond of 2,000*l.*, "never more to come at the Lady Purbeck," with bail for

[1] *Weldon* says, that "Lord Purbeck's brothers practised to make him mad, and thought to bring that wretched stratagem to effect, by countenancing a wicked woman, his wife, the Lord Coke's daughter, against him, even in her base and lewd living."—*Court of James I.*, p. 127. Her petition to the House of Lords, in 1641, contradicts this statement. *Vide* postea.

[2] Letter from Mr. Gerrard to Lord Strafford, dated 17th March 1634-5. —*Strafford Papers*, vol. I. p. 390.

[3] *Ibid.*

[4] *Ibid.*, dated 19th May 1635, p. 126.

Purbeck Case, 17 Car. I. 1641.

his appearance when called upon; "so I hope," adds the writer who has just been cited, "there is an end of that business. The lady, I hear, passed in man's clothes, first into Jersey; since she is in France, and there means to continue[1]."

These extracts from letters written at the period, show that Lady Purbeck's connection with Sir Robert Howard was notorious; and the severe measures adopted against her by her husband's relations, probably arose from their desire to prevent her having children, because, under the existing law, they would inherit her husband's honours as well as those of his family. Her own account of her conduct is given in a petition, which she presented to the House of Lords in February 1641, wherein she admitted the birth of a son after her separation from her husband, and that it was baptized by the name of Wright; but she explains those circumstances, and all the proceedings against her, in a very specious, if not convincing manner. Her petition commenced with stating, that during her minority, about twenty-three years before, by the command and advice of her late father, she married Viscount Purbeck, to whom she brought a large estate, besides the sum of 10,000*l.* paid by her father to the Duke of Buckingham, as part of her portion, with which he was to purchase lands for her; that not long after their marriage, her husband's mother and others, "upon some pretence of weakness and distemper of her lord and husband, caused them to live apart, during which time they disposed of his estate, the most of which came from her father," and left her destitute of the means of support; that when, in her necessity, she applied to them for succour, "she was most barbarously carried by force into the open street, and there left void of relief;" that as her

[1] *Strafford Papers*, dated 24th June 1635, p. 434.

husband was " kept from her, and she destitute," notwithstanding the great estate she brought to him in marriage, the late King James interfered; in consequence of which, the Duke of Buckingham, who managed Lord Purbeck's property, agreed to allow her one thousand marks per annum, and her own jewels, apparel and furniture; but it was proposed, that the possession of her jewels and apparel, &c. should depend upon her agreeing not to " cohabit again with her husband," and that her annuity should cease during such cohabitation; to which, " though very unreasonable," she was obliged, from her necessities, to consent. She then adverted to the most material features of her case, which are best described in her own words : Purbeck Case, 17 Car. I. 1641.

" And although sometimes she and her husband had the happiness afterwards to meet together, yet was the same concealed as much as might be, to avoid the danger and prejudice she would have sustained by the discovery thereof; and although her husband was by them thought too weak in understanding and distempered, as unfit to cohabit with your petitioner, yet have such as have had the custody of him, and disposition of his estate, gained from him the assurance of all his own lands of inheritance, and converted and disposed great part of his other estate to their own use, and possessed themselves of all the evidences of your petitioner's father's lands, settled upon the marriage, which ought to remain to your petitioner and her issue.

" That not contented thus to have injured your petitioner, but endeavouring to ruin her in her honour and fortunes, the said Countess of Bucks, with many others in her company, when your petitioner was with child, and near her delivery, and in the night time, when she was in bed, in a riotous and unlawful manner entered her chamber, and there barbarously hauled her out of

Purbeck Case, 17 Car. I. 1641.

bed; and Sir Edward Villiers, knight, being one of the company, most inhumanly held her by force, upon pretence that midwives and others should search her, whether she were with child or not, to the danger of herself and the like of her child, which enforced her to withdraw herself to a private place, unknown to her adversaries until her delivery, and to take upon her a feigned name, both for herself and the son born of her body, and to pretend herself to have been the wife of John Wright, and the son, born of her body, to be entered in the register of the parish where he was christened by the name of Robert Wright, thereby to conceal both herself and child from their rage and fury, which she had just cause, from her former barbarous usage, to fear and suspect.

"That no sooner was it discovered that your petitioner was delivered, but she and her servant, without any cause, and contrary to the law, were committed and detained close prisoners; and if at any time your petitioner obtained enlargement, she was again illegally committed, and if enlarged, yet upon bail, and enforced to attendance from time to time without any cause at all, to her great damage and dishonour; and leaving nothing unattempted that might wound her honour, or ruin her and her posterity, she was cited into the High Commission Court for a supposed crime of adultery, and there, by an unwarrantable and most illegal sentence, condemned and fined 500*l.*, and unlawfully committed to prison; for inducing which sentence, the prosecutors endeavoured by negative proofs to make appear that your petitioner and her husband did never meet together for above a year before her delivery, (thereby contrary to law to blemish and asperse her issue, and contrary to the truth, as appeared by many affirmative proofs); and although your petitioner desired therein to be tried by

her own husband, who best knew the truth thereof, yet would not that be granted her ; and when she afterwards obtained a rule in the Court of Common Pleas for a prohibition to the High Commission Court, in respect of the illegality of the said sentence, (and none did openly, or could rationally, oppose it), yet could she not ever obtain the said prohibition under seal, and that benefit which the law affordeth, or at least ought to yield to every subject."

Purbeck Case, 17 Car. I. 1641.

The petition proceeds to notice her imprisonment in the Gate House, by command of the Archbishop of Canterbury, " grounded upon the said High Commission's sentence as was pretended, though countenanced by pretext of some other illegal warrant; and finding the Archbishop's prosecution violent, being one and a chief judge in pronouncing the said sentence, did, to prevent that danger which through his great power she then feared, make an escape ; for which, in the first place, she craves your Lordships' honourable and favourable interpretation, and your noble intercession to her gracious Sovereign for his royal pardon; and that your Lordships would be honourably pleased, as in care of her and her posterity, to take order for the safe custody of the evidences of her own lands, and disposing the said 10,000 *l.*, according to the said agreement, which hitherto is not done ; so to take all the aforesaid illegal proceedings, and her extreme sufferings and damages, into your honourable consideration, and that right may be done her according to justice and equity ; and that William Alcocke, administrator of the goods and chattels of the late Duke of Bucks, the Countess of Denbigh, and such others as pretend title to the Lord Purbeck's lands, the Lord Archbishop of Canterbury's grace, Sir Henry Martin, knight, and such others as have been the agents and instruments in the aforesaid illegal proceedings, may be

Purbeck Case, 17 Car. I. 1641.

called to answer the premises before your Lordships, and that your petitioner may have relief, and they receive punishment according to their demerits[1]."

On the 22nd of February 1641, the House of Lords ordered that Lady Purbeck should have warrants to summon her witnesses[2]; and that Lady Denbigh should be allowed a few days farther time to appear[3]. On the 12th of May a day was appointed for hearing the case before the Committee for Petitions[4], and on the 15th of June it was fixed for the ensuing Saturday; but nothing more occurs on the Journals respecting the petition, except that on the 30th of June[5], it was ordered that the report concerning the Lady Viscountess Purbeck should be made on the following Monday.

Lady Purbeck died in 1645[6], and her husband, who married a second wife but had no issue by her, died in February 1657[7]. Sir William Dugdale states that Viscount Purbeck died without any issue[8]; and that Robert Wright, his wife's child, who was afterwards called "Villiers *alias* Wright," having married Elizabeth, the daughter and heiress of Sir John Danvers, one of the regicides, obtained a patent from Oliver Cromwell to abandon the name of Villiers, and to assume that of Danvers, upon his allegation of hatred to the name of Villiers, in consequence of the injuries which that family had done to the Commonwealth.

The Convention Parliament assembled in April 1660, without any writs having been issued from the Crown;

[1] *Harleian MS.* 4746. [2] *Lords' Journals,* IV. 168, 169.

[3] *Lords' Journals,* IV. 246. [4] *Ibid.* p. 276. [5] *Ibid.* p. 295.

[6] *Dugdale* says, "What issue [her husband] had by her, I am yet to learn."—*Baronage,* II. p. 432. [7] *Ibid.*

[8] Some MS. additions to a copy of *Dugdale's Baronage,* in the Author's possession, which were made about the year 1690, state that the Viscount left several daughters; and state that the grandson of the said Robert Wright *alias* Villiers *alias* Danvers, was "called Earl of Buckingham, but is denied all peerage yet."

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and it is not known, whether a letter was addressed to Robert Danvers, similar to that which was sent by a Committee of the Lords to the other peers, desiring them to attend the House[1]. He then represented Westbury in the House of Commons, but was considered by the Lords as a peer, on the presumption that he was by law son and heir of the late Viscount Purbeck. He was, however, very desirous to divest himself of the peerage, and the proceedings on the subject present this extraordinary inconsistency,—the House of Lords attempted in 1660 to *compel* an individual to take upon himself the dignity of the peerage; and in 1678 they refused to allow it to his legitimate son, upon the ground that his father (he whom the House *insisted* was a peer, and whose act in the courts of law to divest himself of the honour they voted illegal) was illegitimate.

Lord Purbeck having used some expressions which were deemed treasonable, the matter was brought to the notice of the House of Lords; and on the 9th of June 1660, the following entry occurs on the Journals: "Ordered, that the business concerning the Lord Viscount Purbeck, be recommended to the consideration of the Committee for Privileges[2]."

On the 15th of June the Committee reported, that he might be secured by order of the House, for treasonable words alleged and offered to be proved against him. It was then ordered, that he should be taken into custody and brought before the House, "to answer an information of high treason and other high misdemeanors against him[3]." The next day, the 16th of June,

[1] *Lords' Journals*, XI. 3. [2] *Ibid.* XI. 58.

[3] *Lords' Journals*, XI. 64. The Earl of Monmouth declared, upon his honour, that he had heard Viscount Purbeck say, "that rather than the late King should want one to cut off his head, he would do it himself."—*Ibid.* And that "he had rather wash his hands in the King's blood, than in the blood of any dog in England," &c.—*Ibid.* XI. 93, 94.

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he being in custody, and the House having considered in what manner he should be called in, it was determined "that he should come into his place as a peer, and hear the information read against him;" but the usher stated that "Viscount Purbeck had told him he had neither writ nor patent to be a peer, and therefore knew no place he had here in this House, but was now a member of the House of Commons, and therefore he would not come." The House considering this answer and refusal, to be a contempt, ordered him to be brought to the bar as a delinquent; when he was accordingly brought in, and "knelt at the bar as a delinquent, until by order of the House he was commanded to stand up," when the information against him was read, the purport of which was, that he had spoken treasonable and blasphemous words. Having obtained leave to speak, he said, "he valued the honour of this House very much, but he hath no right himself to this honour of a peer, because he can find no patent for any such honour in the Petty Bag Office, nor any writ[1]."

He further said, "that he had petitioned the King to give him leave to levy a fine, to clear him of any title to that honour; and his Majesty hath made an order to the Attorney-general to that purpose; and the reasons (he said) to induce him to this, were: 1. This honour was but a shadow without a substance. 2. His small estate was unfit to maintain any such honour. 3. That noble family he comes of, never owned him; neither hath he any estate from them. As touching the information now against him, he said, he is chosen a member of the House of Commons to serve there this Parliament; and being so, he did not know whether he should answer or no, but appealed to their Lordships whether he is to be tried here by their Lordships or no?"

[1] *Lords' Journals*, XI. 65.

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The Lords not being satisfied with this plea, he was informed that they expected he would make further answer, when he requested a copy of the charge, which was refused, "because it was but an information, and no charge," and he was told that he was expected to answer to the information. He then requested to be allowed "to advise with his counsel whether he should answer; and he did not know, in regard he was a member of the House of Commons, whether he might answer." He withdrew in custody[1]; and on the 26th of June, a petition was presented to the House, in which he described himself in this singular manner: "Robert Danvers, *alias* Villiers, whom your Lordships are pleased to honour with the title of Viscount Purbeck." The petition expressed his respect for the House, and stated that he "not knowing he had any patent or writ, thought it too great a presumption to own a place amongst your Lordships; yet your Lordships being pleased to think your petitioner hath a right thereunto, your petitioner, if he may receive a continuance of your Lordships' favour, cannot decline so great an honour;" but that the truth was, he had not property sufficient to support the dignity; that he had been obliged to pay 2,650*l.* for his composition, had incurred heavy expenses for law-suits, and had five small children to provide for; and he prayed to be discharged from imprisonment "without any mark of the House's disfavour[2]."

In consequence of this petition, the House ordered that all the informations, and a paper of precedents, should be delivered to the Attorney-general and King's Counsel, who were to state the business to the House, so that it might give further directions therein[3].

[1] *Lords' Journals*, XI. 65, 66.

[2] *Harleian MS.* 4746. No notice of this petition occurs on the Lords' Journals.

[3] *Lords' Journals*, XI. 76.

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The Attorney-general made his report on the 16th of July, on which day Lord Purbeck presented another petition, in which he again described himself as "Robert Villiers *alias* Danvers, whom your Lordships are pleased to honour with the title of Viscount Purbeck." He expressed his sorrow, if he had given the House any just cause of offence; asserted his innocence of the crimes imputed to him; and said that "it was his great ambition to be found innocent, and stand right in their Lordships' favour;" that he had various business which required his attention; that his health was injured by his imprisonment; and he therefore prayed to be released, upon his parole, to attend the House whenever he was desired to do so[1]. All which was done by the House upon this petition, was to order the Attorney-general "to give an account of this business referred to him on the following Monday[2]".

Pursuant to that order, which it appears related to precedents of the surrender of dignities to the Crown, the Attorney and Solicitor-general and the King's serjeant reported, that Lord Purbeck had petitioned the King "to accept of a surrender of the Barony of Stoke and Viscountcy of Purbeck, as well as of the pretended titles to him in remainder[3], of the honours of Baron Whaddon of Whaddon, Viscount Villiers, and Earl of Bucks, which His Majesty had accepted of, and referred it to the law officers to take care that a fine or some other conveyance be made thereof;" and it is said that Lord Purbeck had "produced the opinions of several learned counsel that he might legally surrender his said

[1] *Harleian MS.* 4746.

[2] *Lords' Journals*, XI. 91.

[3] George Villiers, the younger brother of John Viscount Purbeck, was, it seems, created Baron of Whaddon, Viscount Villiers and Earl of Buckingham, with remainder, failing his issue male, to his brothers John and Christopher, and the heirs male of their bodies respectively.

pretended dignities to His Majesty; and we are also of the same opinion that he may legally do it, with His Majesty's consent, without the consent of any other person whatsoever." This report was signed by Sir John Glanville, the King's Serjeant, Sir Jeffrey Palmer, Attorney-general, and Sir Heneage Finch, Solicitor-general; and they also made their report respecting the informations against Lord Purbeck for treason and blasphemy[1].

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The House referred all the documents to the Committee for Privileges, to hear counsel and witnesses; and on the 27th of July, the Committee reported their opinion, that the King's Counsel should be appointed to bring in a charge against the Lord Viscount Purbeck, within a short time, or else that he be discharged. The Lords then ordered that he should be admitted to bail, on giving his own security for 10,000 *l.* for his appearance[2]; and on the 10th of September he was released from his restraint, giving such security by bond as might be approved by the Attorney-general, to the value of 10,000 *l.*, to appear before the Lords in Parliament when he should be required[3].

Nothing more occurs on the Lords' Journals respecting the title of Lord Purbeck, until the 25th of November 1661, on which day there is this entry: "The name of Viscount Purbeck not being in the list of the names of the Lords, by which this House was called this day, it is ordered to be referred to the Committee of Privileges, to consider whether he be to sit in this House as a Peer or not[4]," which is the last entry on the subject in the Journals for upwards of thirteen years. The fine was levied, and the honours of Baron of Stoke, and Viscount of Purbeck, as well as the remainder

[1] *Journals*, XI. 93, 94.
[2] *Ibid.* XI. 107.
[3] *Ibid.* XI. 166, 167.
[4] *Ibid.* XI. 337.

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to those of Earl of Buckingham, Viscount Villiers, and Baron Whaddon, were considered to have been legally surrendered to the Crown.

Lord Purbeck *alias* Robert Danvers died about 1675, leaving Robert, his son and heir, then a minor, who, by the description of "Robert Villiers, son and heir of Robert, and grandson of John Viscount Purbeck and Baron of Stoke," presented a petition to the King, which was referred to the Attorney-general on the 22nd of April 1675[1]. He stated that his father, "to his great injury, had been so ill advised as to endeavour to cut off those honours that were conferred upon his family, which he was advised, it was not in his father's power to do;" that his father had by that and other actions "unhappily incurred His Majesty's displeasure, for which and all things the petitioner was most extremely sorry, and was anxious to redeem his father's faults by his own loyalty and devotion;" and he prayed the King "to permit him to attend upon His Majesty in the House of Peers, as others of his quality that are under age do; and he hoped that the justice of his cause would so much appear, as that he should have His Majesty's grace and favour in the maintenance of his right." The petition was signed "R. Purbeck." The Attorney-general, Sir William Jones, reported that "as it was a considerable question, never yet resolved, (that I know of) whether a peer can by a fine bar or extinguish an entailed honour, I am humbly of opinion that it will be fit for your Majesty to refer this petition to the consideration of your House of Peers," which was done on the 30th of April. On the petition and report being read, the House ordered that what suggestions shall be made by the Earl of Denbigh, or any other person, by way of answer to it, "should be delivered to the House

27 Car. II. 1675.

[1] *Lords' Journals*, XII. 673.

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in writing, on the 3rd of May[1]; on the 5th of which month, Basil Earl of Denbigh presented a petition against the claim, a copy of which was ordered to be given to the petitioner[2]. The Earl of Denbigh was the son of the sister of the first Viscount Purbeck, and opposed the claim, on the part of the Villiers family, (of which George Duke of Buckingham was then the head, and to some of whose honours the claimant would be heir presumptive), alleging, that the claimant's father was illegitimate.

Up to that moment, no question appears to have been raised in the House of Lords respecting the legitimacy of Robert Danvers, the petitioner's father, who always had been considered by the Crown, and by the House, as Viscount Purbeck, who was allowed to surrender his Peerage, and who had even been voted in contempt for denying his own right to that dignity, and for refusing to take his place in the House of Lords. The claim of Robert Villiers in 1675 was, however, opposed on two grounds; first, that the fine levied by his father, barred his right to the honours; and, secondly, that his father was not the legitimate son of John, first Viscount Purbeck.

On the 20th of May 1675, the House, after several postponements of the case[3], determined to hear counsel on the 3rd of June, "both in maintenance of, and against the plea of Robert Villiers, put in on the petition of the Earl of Denbigh, and not upon the merits of the cause, as well as what the Duke of Buckingham might urge

[1] *Lords' Journals*, XII. 673. Sir Heneage Finch, Lord Finch of Daventry, and afterwards Earl of Nottingham, who was then Chancellor, states, in his MS. notes of this case, that the Duke of Buckingham, the Earl of Denbigh, and "all that interest," insisted that the petitioner's father was illegitimate.—*Le Marchant*'s Report of the *Gardner* Case, Appendix, p. 421.

[2] *Lords' Journals*, XII. 679.

[3] *Ibid.* XII. 689. 696.

Purbeck Case, 27 Car. II. 1675.

by his counsel[1]". But as neither the Earl of Denbigh's, nor the Duke of Buckingham's counsel attended on the appointed day, the Earl of Denbigh's petition was dismissed, and the Duke was ordered to pay 20 *l.* costs "to the said Robert Villiers" for his counsel's attendance[2]. No further proceedings took place until the ensuing Session; and on the 14th of November 1675, the House ordered that his petition should be taken into consideration on the 24th of that month[3]; but on the 22nd, Parliament was prorogued until the 15th of the ensuing February[4]. Soon after it assembled, Villiers presented a petition to the House, which was read on the 3rd of March 1676, in which he adverted to his petition to the King in April 1675, and to what had taken place in the House thereupon, and prayed it "to take his case into its speedy and serious consideration, and to determine therein according to the justice thereof[5]." After it was read, the Earl of Denbigh said, that the matter of the petition concerned him and the Duke of Buckingham, and requested that they might be heard before the business was determined; adding, that he would see the Duke, and would acquaint the House on the Wednesday following "what time he wished to answer the said petition," in which request the House acquiesced[6]. On that day Lord Denbigh stated, that the Duke of Buckingham desired that there might be "no further proceedings on the said pretence (of the claim to the Viscountcy of Purbeck) until he may be so happy as to be at liberty to attend this House;" and the House resolved that "there should be no further proceedings upon that pretence till a further order[7]." Nothing occurs on the Journals respecting the claim

28 Car. II. 1676.

[1] *Lords' Journals*, XII. 701.
[2] *Ibid.* XII. 719.
[3] *Ibid.* XIII. 17.
[4] *Ibid.* XIII. 35.
[5] *Ibid.* XIII. 59 60.
[6] *Ibid.* XIII. 60.
[7] *Ibid.* XIII. 64.

Purbeck Case, 30 Car. II. 1678.

from that time for two years[1], the next proceeding being on the 14th of March 1677–8. On that day another petition was read from the claimant, addressed to the King, and by His Majesty referred to the House, "complaining that he was then of age, that the Chancellor was scrupulous in issuing a writ of summons, because his case, under a former reference to the House, was still depending and undetermined, and praying that it may not want a member, nor the petitioner suffer any longer by the delay[2]." The House resolved that he should be heard at the bar by counsel on the 21st of that month, and that notice thereof should be given to the Duke of Buckingham, the Earl of Denbigh and Lord Brudenell[3], "who might then also be heard what they had to offer in opposition to the claim, if they thought fit." Counsel were accordingly heard on the 26th of March; and the House resolved to hear the Attorney-general, on behalf of the Crown, "upon the whole matter of fact and law," on the 8th of April[4]; but the further hearing was at different times adjourned[5]

[1] Lord Finch, afterwards Earl of Nottingham, who was then Lord Chancellor, states in his MS., "All my Lords conceived that the petitioner's interest to stand behind the chair at the debates of the House, was not so considerable as to oblige the Lords to come to a present decision of the point, though the rest of the privileges of an infant peer did very much depend upon it; so the debate was laid aside for three years, till the petitioner should be of age, but special care was had that no entry in the Journals should mention the petitioner by that style which he gave himself, viz. Viscount Purbeck. When the petitioner came of age he presented another petition to the King, praying his writ of summons, and complaining of me, that I made some scruple of sealing it, by reason of the debates which had been in the Lords' House."—*Le Marchant*'s Report of the *Gardner* Case, Appendix, 421.

[2] *Lords' Journals*, XIII. 183.

[3] It does not appear why notice was ordered to be given to Lord Brudenell.

[4] *Lords' Journals*, XIII. 191.

[5] *Lords' Journals*, XIII. 216. 225.—On the 3rd of June the petitioner's counsel were ordered "to be prepared to speak to the point of law, whether the fine of his ancestor hath barred his demand; and at the same time Mr. Attorney-general is to conclude with his observations upon the fact, and his

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to the 5th of June, on which day counsel were heard for the Duke of Buckingham and the petitioner, and the Attorney-general was also heard[1]. On the 7th of June, the House ordered the case to be again considered on the 12th of that month, that all the Judges (except the two Chief Justices and Chief Baron) should be present, and that before that time, the Attorney-general should bring to the House a list of such precedents as he had cited in his argument on the previous hearing[2]; but on the 12th the case was put off until the 15th, and the clerk of the Crown, the clerk of the Petty Bag, and such other officers as kept books of entries of patents in or about the 17th Jaq. I., were also ordered to attend[3]; which order arose from the assertion of Robert Danvers *alias* Lord Purbeck, in 1660, that the patent of the Viscountcy was not enrolled. The case was resumed on the 15th of June; and the only thing remarkable which took place on that day was, that the Duke of Buckingham complained of a paper, "scandalous to the memory of his father, and the honour of his family," which had been printed and dispersed, and requested that the claimant should be called in, and asked whether he owned the said paper or not? The Duke's request being acceded to, "the petitioner desired he might not be asked any questions respecting it, as he knew not how much his answer might be to his prejudice[4]."

On the 18th of June 1678, the House, after a debate, came to the memorable and unanimous resolution, that "No Fine now levied, or at any time hereafter to be levied to the King, can bar a Title of Honour, or the right of any person claiming such Title

argument upon the Law." All suits, arrests, attachments, and other process, in the Courts below, against the claimant, were ordered to be stayed, until the House gave judgment in his claim.—*Ibid.* p. 237.

[1] *Lords' Journals,* XIII. 239.

[2] *Ibid.* 242.

[3] *Ibid.* 246.

[4] *Ibid.* 249, 250.

under him that levied or shall levy such Fine[1]." The arguments on that subject are fully reported[2]; but as that part of the claim does not relate to the question of legitimacy, no further notice will be taken of it.

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After coming to the above resolution, the House determined to resume the consideration of the claim on the 20th of that month, and ordered the Attorney-general, and the Judges to be present[3]. On that day, after a long debate, this main question was proposed, "Whether the petitioner hath right, by law, to be admitted according to his claim?" Then this previous question was put, "Whether this question shall be now put?" It was resolved in the negative. The question being put, "Whether the King shall be petitioned to give leave, that a Bill may be brought in to disable the petitioner to claim the title of Viscount Purbeck?" It was resolved in the affirmative. Then the House appointed the Earl of Bridgwater, the Earl of Shaftesbury, and the Lord Wharton, to prepare a petition for that purpose, and to report to the House[4].

The proceedings of the House of Lords on this occasion, bear a striking resemblance to those on the Banbury claim in 1660, as it acted upon the impression that the petitioner's father was not *de facto*, the son and heir of the first Viscount Purbeck. Although it was imperative upon the House, as a court of law, to pronounce such a decision as the law of the land prescribed, it adopted a course which can neither be reconciled with legal justice, nor with its own dignity. Having proceeded, as a Court of Law, to try a right of inheritance, up

[1] *Lords' Journals*, XIII. 253.

[2] *Collins's Precedents*, 296, *et seq.* *Parliamentary Cases, &c.*

[3] *Lords' Journals*, XIII. 253. The Minutes of the proceedings are unfortunately lost. Had they been preserved, it is probable that they would have shown the opinions of the Judges on the Law of the case, so far as it bore upon the legitimacy of the claimant's father.

[4] *Ibid.* XII. 256.

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to the moment when it was called upon to deliver judgment, the House refused to decide the question of right; and, suddenly abandoning the character of a Legal tribunal, it resumed its Legislative functions, and determined to disqualify a man, by Bill, from enjoying an hereditament to which, as the House well knew, he was entitled by the Law of the land. So far from having expressed a doubt of his father's right to the Peerage, during the lifetime of that person, the House had fully recognized him as a Peer, by ordering him to take his seat, by visiting him with its displeasure for refusing to do so, by concurring with the Crown in allowing him to resign his honours, and by afterwards voting that the surrender of those honours was illegal; yet, with a degree of inconsistency which is without a precedent, it proposed to disqualify the lawful son and heir of that very individual by a special Act of Parliament, on the ground that his *father* was *illegitimate*. This flagrant disregard of the rights of the subject, and of all legal and constitutional principles, has no parallel, except in the proceedings of the House itself on the Banbury case. But there were not wanting Peers on this, as on that occasion, to vindicate the honour of the House, and the pure administration of the Law, by recording their dissent from such extra judicial, and anomalous measures. The following able and spirited protest against the resolutions was entered on the Journals, and signed by the Earls of Oxford, Anglesey, (who was, then Lord Privy Seal,) Danby[1], and Northampton, and by the Lords Culpeper, Hunsdon, and La Warr:

" 1. The Lords being in judgment as the highest

[1] All the Peers, except the Earls of Danby and Oxford, were dead when the House came to the resolution on the Banbury claim in 1693. Lord Danby, then Marquis of Caermarthen, also protested against that resolution. Lord Oxford was at that time a very old man.

Court of England, in a cause referred to them by His Majesty (and whereof they are the only proper Judges), concerning the right of Nobility claimed by a subject that is under no forfeiture, and wherein their Lordships had in part given judgment before, that he was not (nor could be) barred thereof by a fine and surrender of his ancestor, it was, as we humbly conceive, against common right and justice, and the orders of this House, not to put the question that was propounded for determining the right. Purbeck Case, 30 Car. II. 1678.

" 2. The said claimant's right, (the bar of the fine of his ancestor being removed), did, both at the hearing at the bar and debate in the House, appear to us clear in fact and law, and above all objections.

" 3. His said right was acknowledged even by those Lords who therefore opposed the putting of the main question for adjudging thereof, and carried the previous question (that it should not be put); because in justice it must inevitably (if it had been put) have been carried in the affirmative, and his right thereby allowed.

" 4. By the putting and carrying the third question, concerning leave to bring in a Bill to bar him, his right to the said title is confessed; for he cannot be barred of anything which he hath not right to, and this renders the proceedings in this cause contradictory and inconsistent.

" 5. The petitioning the King to give leave for such a Bill to be brought in, is to assist one subject, videlicet, the Duke of Buckingham, against another, in point of right, wherein Judges ought to be indifferent and impartial.

" 6. This way of proceeding is unprecedented, against the Law and common right, as we humbly conceive, after fair verdicts and judgments in inferior courts upon title of lands, which have long been in peace, and vested

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in the claimer by descent, without writ of error brought, or appeal, to suffer the same to be shaken or drawn in question by a Bill.

"7. This way by Bill, in a case of Nobility, is to admit the Commons with us into judicature of Peers.

"8. It is to make His Majesty party in a private case against a clear legal right, to anticipate and pre-engage his judgment in a cause carried upon great division and difference of opinion in the House; and forstals His Majesty's royal power and prerogative, which ought to be free to assent or dissent to Bills, when they shall be tendered to him by both Houses.

"9. After so many years' delay, to give no answer to His Majesty's reference, nor judgment in the claimer's cause, is a way in which the Kings of this realm have not been heretofore treated, nor the subjects dealt with.

"10. We conceive this course, in the arbitrariness of it, against rules and judgments of law, to be derogatory from the justice of Parliament, of evil example, and of dangerous consequence, both to Peers and Commoners[1]."

The draught of the petition to the King for leave to bring in the Bill for disabling Robert Villiers, was read on the 26th of June[2]; and after several postponements[3], it was discussed by the House on the 9th of July, and carried on a division, that the petition, as amended, should be presented to the King[4]. The Earls of Northampton and Anglesey again entered their protest, in terms which show that they took a just and constitutional view of the subject; and it is stated that the protest was written in the Lord Privy Seal's own hand[5].

"1st. That this is a transition from our judicature, in a case of Nobility, wherein the Lords are proper and sole judges, to the exercise of legislature, wherein the Com-

[1] *Lords' Journals*, XIII. 256. [2] *Ibid.* XIII. 263.
[3] *Ibid.* XIII. 264. 274. [4] *Ibid.* XIII. 277. [5] *Ibid.*

mons have equal share with us, and admits them judges of Peerage; which I conceive ought not to be, if he be a Peer, as seems implied by proposing a law to bar his title; and there is no need of a law, if he be no Peer. Purbeck Case, 30 Car. II. 1678.

" 2dly. If a Bill come in, the cause must be heard again; and then judgment ought to be given, which (if against him) the Commons must credit upon the proofs made here, where only witnesses are sworn; and therefore judgment here ought to be final.

" 3dly. This petition is no answer to His Majesty's reference; and we leave Him in uncertainty, when He asks our opinion, or desire the Royal assent to nothing, if he hath no title to be barred.

" 4thly. If the Commons should reject a Bill sent to them, they establish him a Peer, by judging it injurious to bar him by a law; and so would seem more tender of Peerage than we.

" 5thly. Leave is asked of His Majesty to bring in a Bill, when every Peer hath right to do it in this case, if he conceive himself aggrieved by a false claim of honour; and therefore several Lords have been admitted parties against him upon former hearings, and judgment given in part for him, by a vote that he is not barred by the fine of his father.

" 6thly. It seems against common right to bar any by Bill, who claims a legal title, without forfeiture be in the case; and if so, there needs no Bill[1]."

The petition to the King for leave to bring in a Bill, for disabling the petitioner from claiming the dignity, expresses no opinion upon the claimant's right, nor does it even state any grounds for the measure; but after saying that the House had fully " heard, examined, and considered the petitioner's claim to be Viscount of Purbeck and Baron of Stoke, and after long hearing of counsel,

[1] *Lords' Journals*, XIII. 277.

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and several debates thereupon had, we have resolved to petition your Majesty, and do humbly beg that your Majesty will be graciously pleased to give leave that a Bill may be forthwith brought into this House, whereby the petitioner may be disabled to claim the said title[1]." Thus, upon a reference from the Crown, commanding the House of Peers "to hear, examine and consider the petitioner's claim, and to judge the same as to their Lordships shall seem just and reasonable[2]," they adopted the extraordinary measure of petitioning the King for leave to disable the claimant by Bill, from enjoying a right of inheritance, to which, without such Bill of disqualification, he was undoubtedly entitled; and yet, for a proceeding at variance with every principle of Law, they assigned no reason; they anxiously avoided giving any opinion upon the abstract question of right; and they stated no personal cause of disqualification.

On the 11th of July 1678, the Earl of Anglesey, Lord Privy Seal, reported, "that the Lords appointed by this House had waited on His Majesty, and presented him with the petition of this House, that His Majesty would please to give leave that a Bill may be brought in to disable the petitioner, who lays claim to the title of Viscount Purbeck, from claiming the title of Viscount Purbeck; to which His Majesty gave this answer, 'That he will take it into consideration[3].'" The attempt of the House to carry the measure being thus checked by the Crown, probably with the advice of the Lord Chancellor, and Lord Privy Seal, no Bill of the kind was ever brought in; nor do the Journals notice any farther proceedings on the subject. The claimant did not however venture to prosecute his right; and he may have had

[1] *Lords' Journals*, XIII. 277. [2] *Ibid.* XII. 673.
[3] *Ibid.* XIII. 282.

Purbeck Case, 30 Car. II. 1678.

strong reasons for believing, that notwithstanding the hostility of the tribunal by which it would be decided, had been restrained by the Crown, the opposition was still too powerful to admit of the slightest prospect of success. In any case, however, the inconsistency and injustice of the proceedings of the House of Lords, respecting the Viscountcy of Purbeck, are glaring; for if an Act of Parliament was necessary to disable the claimant, he continued to be entitled until that Act was passed; and as it was never even brought in, his legal *status* remained unaltered. The facts of this singular affair may, therefore, be summarily described to be these: A person having claimed a Peerage to which he was entitled by law, the House of Lords did not deny his legal right, but gave him to understand that if he insisted upon it, a law would be purposely made to disqualify him. The case has since remained as it stood at that time, except that in 1708, John Villiers, the eldest son of the petitioner, was a claimant[1]; and it is said that he petitioned the King for the earldom of Buckingham. He died without issue male in 1723, before any decision was pronounced; and his cousin german, and heir male, the Rev. George Villiers, is stated to have afterwards claimed the dignity[2], but no proceedings took place.

The argument of the Attorney-general, Sir William Jones, and the speech of the Lord Chancellor Finch, during the claim in 1678, are preserved; and such passages as bear on the legitimacy of the claimant's father will be extracted. It seems from those speeches, as if a doubt existed, not only whether the father of the claimant was begotten by John Viscount Purbeck, but whether he was the son of the *Viscountess* Purbeck.

[1] *Votes of the House of Commons*, 5 March 1709.

[2] *Banks' Dormant and Extinct Peerage*, vol. III. p. 614.—The male line of the family appears from the pedigree there given, to be extinct.

Purbeck Case, 30 Car. II. 1678.

According to Lord Nottingham's manuscript[1], the Attorney-general, on the 5th of June 1678, stated that the Duke of Buckingham desired to offer some further evidence as to the matter of fact; and showed how that the petitioner's father had exhibited a bill in Chancery against the grandfather; and the grandfather, by his answer upon oath, denied him to be his son, and insisted that the father could not be the son of the grandfather, for that he was christened by the name of Robert Wright, and took a patent from Cromwell to be called Danvers, and afterwards, at the bar of the House of Lords, renounced the name of Villiers. The Attorney-general then concluded for the King, and said, "First, as to the illegitimation of the petitioner's father, he could not say much; for *without question, the wife's son is the husband's son, if the husband were infra quatuor maria,* &c.; and that the only use to be made of the evidence in this case is, to consider how far it goes towards disproving him the wife's son."

Another, and a fuller report of Sir William Jones' argument[2] is printed; but it relates more particularly to the fine, and contains less on the law of Adulterine Bastardy than occurs in the preceding extract. He said,

"I shall first make some observations on the matter of fact; where I shall not concern myself about the point of legitimation. What proofs your Lordships have had about that, on the one side or the other, I shall not trouble myself with; but submit it to your Lordships' memories and judgment. But this I must take leave to say, though it would be a hard matter to put this gentleman to prove, that if his father was born of his grandmother, that he was likewise the son of the grandfather, and so we bastardize him before your Lord-

[1] Report of the *Gardner Case,* Appendix, pp. 421, 422.

[2] *Collins's Precedents,* p. 297.

ships as a court of judicature, after his death; yet I would be glad your Lordships did receive satisfaction, that he was the son of the grandmother: for you are now introducing a man into a family, out of which he and his ancestors have been for these many years. I might ask, why he was not, by the name of the family, baptized? Why not mentioned by the surname of his father and mother? We can look for no less proof, than that some woman, who was present at his birth, should certify, that he was born of her. But to come after so many years, to bring a man into a family, which he, and his, had disclaimed so long, by taking a new name, I suppose your Lordships will require some good proofs to warrant it. But whether you have anything like that, or that may be sufficient in the case, I submit to your Lordships. His father sure could have had better evidence than this, than his son can now; but he denies him for a long time; and at last the most he owns him by, is a letter whereby he calls him by his surname, which is not very usual for parents to do, if they have but one child; and what can we think sufficient to tempt a man, and him noble too, to deny his own flesh and blood? But there is another thing which is matter of fact also, which is to be observed; and that is, there is a defective proof of the creation of this honour; no letters patents shown; no record of the inrollment produced; nor any entry in any office of such a patent, as is usual; all that is pretended is, that he sat afterwards in some Parliaments as Viscount Purbeck."

Purbeck Case, 30 Car. II. 1678.

Lord Finch, the Chancellor, in delivering his opinion, observed, "The question, whether there be a legitimate succession to this honour, is a question of fact, wherein the doubt is not, whether the petitioner be legal heir to his father, but whether the father were so to the grandfather; and therein it is admitted that the *father is legally the son of the grand-*

Purbeck Case, 30 Car. II. 1678.

father, if he can prove himself the son of the grandmother; and this fact is now called in question, and the grandchild, after fifty or sixty years elapsed, is put to prove, not that his father was lawfully begotten, (every one sees the danger of that,) *but which is all one in consequence*, that his father was begotten of his grandmother. This ought not to be endured; for, 1. *Filiatio non potest probare, nec debet;* 2. It tends to defeat purchases made of the father as heir, &c.; 3. He hath been found heir to the land, and son of the grandmother by a special verdict, in 1635, in *Wegg* v. *Villiers*[1], when matters were more capable of proof, old witnesses being since dead; 4. This should have been questioned, if ever, in the father's life, for he that is certainly a bastard, as being born before wedlock, yet, if he die with the reputation of true heir, he cannot be bastardized afterwards, but his issue shall carry away the land from the legitimate heir. *Litt.* s. Descents. 5. Strange questions are sometimes raised for crowns where armies dispute; but where a coronet only is at stake, it is not to be suffered. The great objections are, that he was baptized by another name, and that the grandfather denied him to be his wife's son; but though it may be a good cause to suspect adultery where too much secrecy is used at baptism, it is no case to make illegitimation. Again, the grandfather's denial upon oath is nothing, for if the grandmother had herself denied him to be her son, yet it had not been material, for still it is capable of disproof. It is disproved here by the verdict, by the nurse and midwife then[2] produced, by the old Lady Hatton owning the child, who could not be in the secret, and by constant reputation. In the parliament of Paris, in the case of Madame de Cognac[3], it was ad-

[1] "2 *Rolle*, 769; 2 *Sid.* 54. The reports of this case do not notice the question of legitimacy."

[2] *I. e.* at the trial above alluded to.

[3] This case is fully stated by Mr. Le Marchant in the Appendix to the Report of the Barony of *Gardner*, p. 496.

judged that the mother's disavowing her child should not prejudice the child, who was able to disprove her. Nay, if the father himself had disclaimed his own legitimation, this ought not to prejudice the grandchild[1]."

Purbeck Case, 30 Car. II. 1678.

It appears from the case of *Rex* v. *Albertson*, which occurred in the Court of King's Bench, in the 9th Will. & Mary, that the doctrine of the "four seas" then still prevailed. An order was made, reciting, Whereas it appears to us, two Justices of the Peace, that Mary Spencer, wife of Jonathan Spencer, mariner, was on the 20th of March 1695, delivered of a male bastard child, which is likely to be chargeable, &c.: and whereas it appears to us that the said Jonathan Spencer was employed on board the ship called the Pembroke, in his Majesty's service, at Cadiz, and was not within the King's dominions when the said child was begotten or born: and whereas it appears that Albertson had carnal knowledge of the body of the said woman, during the absence of her husband, and that he begat the said child; we, therefore, adjudge him to be the reputed father, and to pay weekly, &c. And the said order being confirmed upon appeal, was brought into the King's Bench by certiorari, where it was moved to quash these orders, because 18 Eliz. c. 3, gives the justices power only to meddle with bastards born out of lawful matrimony; so that though this child should be a bastard, yet the justices cannot meddle with it, because he is born in lawful matrimony: but it does not appear in this order that the child was a bastard, for it is only said, the father was absent when the child was begotten, or born, in the disjunctive; also it doth not appear but the husband was in England during the time intermediate between the begetting and birth. The Court said, "He is a bastard who is born of a man's wife, while the husband at, and from the time of

Rex *v.* Albertson, 9 Will. & Mar. 1697.

[1] Report of the *Gardner Case*, Appendix, pp. 422, 423.

Rex *v.* Albertson, 9 Will. & Mar. 1697.

the begetting to the birth, is 'extra quatuor maria.' In case of a real action by him, the tenant may plead general bastardy; and on a writ to the bishop, he will certify him to be a bastard. Being then a bastard as to descent, there is no reason why he should not be a bastard as to all other intents, and in particular, a bastard within the Statute 18th Eliz., which is a remedial Act. Also, when a child is born in adultery, he is born out of the limits of lawful matrimony, the law then taking no notice of the husband; and so, though we must quash this order, because it does not appear that the husband was 'extra quatuor maria,' during all the space of time intervening between the begetting and the birth, yet we hope care will be taken to make a new order without this fault. Quashed; but the defendant was bound over to appear at the sessions[1].

Case of Earl of Macclesfield, 10 Will. & Mar. 1698.

Early in the following year, a case occurred, which has become generally known, in consequence of the literary celebrity of the person whose status it determined. Charles Earl of Macclesfield married Anne, daughter of Sir Richard Mason of Shropshire; but having lived on very unhappy terms with her husband, she formed a criminal connexion with Richard Savage, Earl Rivers[2]. The fruit of this intercourse was a son, of whom the Countess was delivered in a place called Fox Court, near Brook-street, in Holborn, on the 16th of January 1697. It appears that she assumed the name of "Madam Smith;" that she wore a mask for the purpose of concealment, at the time of her confinement; that the boy was baptized

[1] 2 *Salkeld*, 483.

[2] It has been justly remarked that Dr. Johnson's statement, that the Countess "thought a public confession of her adultery the most obvious and expeditious method of obtaining her liberty," is unfounded; because the proceedings in Parliament, on the Bill for divorcing her from her husband, show that she offered every opposition in her power to that measure.—*Boswell's Life of Johnson*. Ed. 1816. I. 145.

Case of Earl of Macclesfield, 10 Will. & Mar. 1698.

on the 18th of the same month, at St. Andrew's, Holborn, by the name of "Richard, son of John Smith and Mary, in Fox Court, in Gray's-Inn-Lane;" and that, from the privacy which was observed on the occasion, the clergyman who performed the ceremony, considered it to have been "a by blow or bastard[1]." This child was supposed to have been the poet, Savage, whose genius and misfortunes were alike extraordinary[2].

On the 15th of January 1697-8, a Bill was brought into the House of Lords, entitled, "An Act for dissolving the Marriage between Charles Earl of Macclesfield and Anne his Wife, and to illegitimate the Children of the said Anne." Three days afterwards the Countess petitioned that she might be heard against the Bill, before the Earl was permitted to make out his allegations, to which the House consented. Twenty-seven witnesses, among whom were Lady Charlotte Orby, Mr. Burbridge, the clergyman who baptized the child, and Mary Pegler, the woman who took it to the church, were tendered on the part of Lord Macclesfield; and twelve witnesses were proposed on the part of the Countess, who obtained a delay in the proceedings because one of them was in Wales. From the beginning of February until the 3rd of March the House was frequently occupied with the cause[3]. On the latter day it resolved that the Bill[4] should pass; but a protest was entered against it by the Earls of Halifax and Rochester, "be-

[1] Case of the Earl of Macclesfield, quoted in *Boswell's Life of Johnson*. Ed. 1816. I. 145.

[2] It has however been said, and upon strong grounds, that the Poet was not, in fact, the issue of Lady Macclesfield and Lord Rivers.—*Ibid.* pp. 147. 149; and see a note on that passage in *Croker*'s Edition.

[3] *Lords' Journals* for 1698, pp. 197. 199. 201, 202. 208. 212. 222. 223.

[4] The Bill does not contain the statement that occurs in the former Acts on the subject which have been alluded to,—that the children of a married woman, though begotten by an adulterer, are nevertheless legitimate and inheritable, &c.,—an omission which perhaps arose from the change which had taken place in the law.

Case of Earl of Macclesfield, 10 Will. & Mar. 1698.

cause we conceive this is the first Bill of this nature that hath passed, where there was not a divorce first obtained in the Spiritual Court, which we look upon as an ill precedent, and may be of dangerous consequence in the future[1]." The Bill was sent to the Commons, and by them committed to a Committee of the whole House, who heard counsel and examined witnesses in support of its allegations, after which it was read a third time and passed[2]. In this instance, as in the cases of *Banbury*, *Roos*, and *Purbeck*, the House of Lords deviated so materially from the usual course of law, as to induce such of its members as were sensible of the danger and impropriety of its proceedings, to protest against them. Nor were the inconsistencies less striking, because the parties, in whose favour these extra-judicial measures were proposed by the House, happened to be themselves Peers.

Regina *v.* Murray, 3 Anne 1704.

The rule which was laid down in *The King* v. *Albertson* was again acted upon by the Court of King's Bench in a similar case, that of *Regina* v. *Murray*, so lately as Michaelmas Term, in the 3rd of Anne. Upon a special order of sessions, where the question was, if the husband be *ultra mare*, and during that time the wife becomes pregnant, whether the infant be a bastard within the Stat. 18 Eliz. c. 3? the Court ruled, that if the husband was out of the four seas during all the time of the wife's going with child, the child is a bastard; but if he were here at all within the time, it is legitimate, and no bastard; and because it did not appear by the order, that the husband was absent all the time of the pregnancy, the order was quashed[3].

There seems, therefore, to be little doubt, that at the commencement of the last century the principle of "the

[1] *Lords' Journals*, for 1698, p. 223.

[2] *Commons' Journals*, for 1698, pp. 145, 146, 152.

[3] 1 *Salkeld*, 122.

four seas," and the definition of Lord Coke, were considered to be the Law of Adulterine Bastardy; and it is very important to inquire, under what circumstances that principle fell into desuetude; in other words, to show when, and in what manner, one of the great landmarks of the Law on the subject was thrown down.

Regina *v.* Murray, 3 Anne, 1704.

The first occasion on which the slightest disposition was shown by a Court of Law, subsequent to the reign of Henry the Fourth, to admit any evidence to rebut the presumption of legitimacy, when the husband was within the realm, except of divorce or impotency, was in the case of *St. George* and *St. Margaret*, in Michaelmas Term, in the 5th of Anne, two years only after the Court of King's Bench maintained the ancient maxim of "the four seas," in the case of *Regina* v. *Murray*. The case of *St. George* and *St. Margaret* was likewise one of settlement: the parties had been divorced *a mensa et thoro*, and the wife afterwards lived with another man named Ellis in adultery, in the parish of St. Giles, by whom she had several children, who bore the name of Ellis, and were registered as his children. The Court said, "When a woman is separated from her husband by such a divorce, the children she has during the separation are bastards; for we will intend a due obedience to the sentence, unless the contrary be showed; but if baron and feme, without sentence, part, and live separate, the children shall be taken to be legitimate, and so deemed until the contrary be proved; for access shall be intended. But if a special verdict find the man had no access, it is a bastard; and so was the opinion of my Lord Hale, in the case of *Dicken* and *Collins*[1]."

Case of St. George *v.* St. Margaret, 5 Anne, 1706.

It was possibly, and indeed probably, intended by the Court, that the "special verdict" of non-access should

[1] 1 *Salkeld*, 123.

Case of St. George *v.* St. Margaret, 5 Anne, 1706.

be found upon the *usual facts*, termed "special matter," namely, divorce, impotency, or the husband's absence from the realm, in which case there would be no variation whatever from the law, as it had been thitherto received. But the reference to the opinion of Lord Hale, and the words of the judgment, certainly admit of the construction, that *other* proofs besides the "special matter" above mentioned, were ruled by that eminent Judge to be admissible.

Case of Dickens *v.* Collins, temp. Car. II.

The case of *Dickens* v. *Collins* ought therefore, to be examined with great attention; but unfortunately no report of it can be found[1]; and all which is known of it, besides what occurs in the above quotation, is the following allusion to it by the Attorney-general in the Banbury claim, in 1693. Speaking of Nicholas Earl of Banbury, he said, "This second son was not heard of in many years; all that is pretended is, that these children were born in wedlock. *Hospell* and *Collins*'s case cited, tried in the Common Pleas, he is no child, during the coverture not heard of, nor that the mother had any child." This observation renders it likely that great doubt existed, in that case, whether the child was the issue of the *wife*; and it would appear that a *supposititious* child had been produced after her death, and that the question of access, on the part of the husband, did not arise.

It is almost certain that the case of "*Hospell* v. *Collins*," which was said by the Attorney-general, in 1693,

[1] Lord Ellenborough said, during the claim to the Earldom of Banbury, "Unfortunately this case is not reported at length; at least, I have not been able to find it, after a careful search." His Lordship stated, however, but apparently only upon the authority of the reference in the report of *Rex* v. *Albertson*, that "the case of *Hospell* v. *Collins*, decided by Lord Hale, left the presumption of legitimacy to the consideration of the jury, who were at liberty to infer whether the husband had access to his wife, from all those circumstances which would have qualified them to determine whether the husband was the father of the child."—Report of the *Gardner Case*, Appendix, p. 457.

to have been tried in the Common Pleas, of which Sir Matthew Hale was Chief Justice from 1656 to 1658, is the same case as that which was mentioned as the case of "*Dickens* v. *Collins*," by the Court, in the cause between the parishes of *St. George* and *St. Margaret*, in 1706. The little which is known of the case of *Hospell* and *Collins* does not justify the inference that has been drawn from it; for there is not the slightest evidence that Lord Hale ruled that, where a man and his wife were capable of access, the presumption of sexual intercourse could be rebutted by any other evidence than divorce, impotency, or the husband's absence from the realm. Had such a dictum been pronounced, it is impossible to believe that it would have escaped the Reporters of the period; for its novelty, and (proceeding from so distinguished a lawyer as Lord Hale), its importance, must have ensured attention to it; hence its omission in the valuable contemporary reports, is strong presumptive evidence, that nothing occurred on the occasion which was contradictory to former decisions, or which, on any other account, was particularly deserving of notice.

Case of Dickens *v.* Collins, temp. Car. II.

But there are other circumstances which render it extremely unlikely that Sir Matthew Hale should have uttered the dictum ascribed to him; or that he entertained a different opinion on the Law of Adulterine Bastardy from his predecessors. His notes on Coke's Commentaries are well known; and as he not only did not deny the correctness of the definition which occurs in the First Institute[1], but *added a long comment* on the *very next* passage, upon the *same subject*, it may be fairly inferred that he assented to Lord Coke's statement. Sir Matthew Hale had, moreover, several other opportunities of expressing his dissent from Lord Coke's assertion. He

[1] 1 *Inst.* 211[a].

Case of Dickens v. Collins, temp. Car. II.

edited Chief Justice Rolle's Abridgment in 1688, which contains a large selection of cases of Bastardy. He was the author of a "History of the Common Law," of a "Treatise on the Jurisdiction of Parliament," of the "History of the Pleas of the Crown," and of several other legal works; but in none of them has any trace of the opinion imputed to him been found; and if he really was at variance with his predecessors respecting the law of legitimacy, still more, if, as has been supposed, he was the first Judge who laid down a new principle, it is scarcely possible that he should nowhere have controverted the generally received impression, and explained his own views on the subject. Admitting, however, that the inference which has been drawn from the case of *Hospell* v. *Collins* is well founded; and that, notwithstanding the reasons which exist for believing the contrary, Lord Hale did dissent from Lord Coke's definition of the Law of Adulterine Bastardy, there are other facts which ought to prevent that circumstance from having much weight. It is submitted, that Lord Hale had no authority, in the writings of the great lawyers who preceded him, or in the decisions of the Courts, for the opinion imputed to him; and it cannot be maintained that the dictum of any one Judge, however eminent, is sufficient to effect a change in the Law; or that his deviation from the path so clearly marked out by the steps of his predecessors, for several hundred years, ought to have been imitated by those who succeeded him.

As so much stress has been laid upon the supposed dictum of Lord Hale, in the case of *Hospell* and *Collins*, it is material to show that whatever may have been his view of the subject, neither his contemporaries nor his successors pronounced any judgment or opinion at variance with the law, as it is laid down by Lord Coke, until long after Lord Hale's time.

Sir Matthew Hale was a Judge of the Common Pleas for only two years, namely, from 1656 to 1658, within which period it would seem, from the remark of the Attorney-general in 1693, that the case of *Hospell* [or *Dickens*] and *Collins* occurred. Lord Hale was made Chief Baron in 1660, and Chief Justice of the King's Bench in 1671, which office he resigned in February 1676, and died in November in the same year; so that his judgment in the case alluded to, could not possibly have been delivered later than the year 1676, and it most probably occurred whilst he sat in the Common Pleas between 1656 and 1658. From that time to the 5th of Anne, 1706, when allusion was made to his dictum in *Hospell* and *Collins*, in the case of *St. George* and *St. Margaret*, thirty, if not fifty years had elapsed. During that period the law of Adulterine Bastardy has been brought to the consideration of the House of Lords on the claim to the Viscountcy of Purbeck in 1678, and of the Court of King's Bench in the cases of the *King* and *Albertson* in 1697, and of the *Queen* versus *Murray* in 1704, on which occasions the Judges laid down the Law in precisely the same terms as those of Lord Coke, and of all earlier authorities[1]. It is true that the resolution of the House of Lords on the Banbury claim in 1693 was not in accordance with this view of the law; but it must not be forgotten, that the House determined upon adjudicating, *without consulting the Judges*, that the resolution was at variance with two reports of the Committees for Privileges, and that several Peers protested against the decision. It is therefore indisputable, that if Lord Hale's judgment was opposed to what was previously considered law, it did not influence Lord Chancellor Finch or the Attorney-general in 1678, both of whom were his contemporaries in office; and that it had no weight

Case of Dickens *v.* Collins, temp. Car. II.

[1] *Vide antea.*

Case of Dickens *v.* Collins, temp. Car. II.

with Lord Chief Justice Holt, and the other Judges of the King's Bench in 1697 and 1704. It is evident from these facts, that perhaps one of the greatest alterations ever made in the Law of this country, except by Act of Parliament, has taken place upon the *supposed* dictum of a Judge, upwards of *thirty*, and perhaps *fifty years after* it was expressed; notwithstanding that one, if not the most obvious, construction of the imperfect account of that judgment, which is preserved, will reconcile it with the law, as laid down by Lord Coke and his predecessors, and with what seems, from other sources, to have been Lord Hale's own opinion on the subject; that neither the case, nor the judgment, is reported; and that, if such a dictum was ever pronounced by Lord Hale, it had been *overruled*, or was *unnoticed*, on *three* important occasions, *before it was cited as a precedent*.

Although the judgment of the Court of King's Bench in 1706, in the case of *St. George* and *St. Margaret*, tended to shake the ancient rule, that no evidence was admissible to rebut the presumption of sexual intercourse, if the husband was within the four seas, unless he was impotent or separated from his wife by divorce, it did not explode that doctrine; and the first time the judgment of the Court of King's Bench had that effect, was in the 3rd George I., 1717, in the case of *St. Andrew*'s and *St. Bride*'s; though it was not regularly determined that the principle was exploded, until the case of *Pendrell* and *Pendrell* in 1732, since which year it has completely fallen into desuetude.

Case of St. Andrew's *v.* St. Brides, 3 Geo. I. 1717.

The case between the parishes of St. Andrew's and St. Brides, in the 3rd George I., was one of settlement: An order of sessions for the removal of a wife and three children from the parish of St. Andrew to the parish of St. Brides, set forth that A., about twenty-three years since, married B., and lived with her five

years in the parish of St. Brides, and had by her four children, two whereof were dead, and the other two provided for; that at the end of five years, he went away from her and married another woman, with whom he lived somewhere in England, but that he never saw his first wife B. from the time of his going away. B., after the separation (having heard nothing for a long time of A.), married a second husband, by whom she had eight children, in the parish of St. Andrew, who all went by the name of the second husband; five of them are dead, and the other three survive. The sessions, presuming that the second marriage of the wife is void *ab initio*, adjudge, that her settlement and that of the three children, is in the parish of St. Brides, where the first husband lived, as deeming the children the legitimate issue of the first marriage.

Case of St. Andrew's *v.* St. Brides, 3 Geo. I. 1717.

The Court quashed the order, as to the children, and confirmed it as to the wife: first, because the second marriage, and living with the second husband in St. Andrew's, was void *ab initio*, and therefore the place of her settlement was where the first husband lived; secondly, it being adjudged that the first husband had no access for seventeen years, no presumption shall be admitted but that these are the children of the second marriage; and they not being born in the parish of St. Brides, nor having ever inhabited there forty days, can have no settlement in St. Brides[1].

No allusion was made by the Court to the fact that the husband continued in the realm, or to the old law of the "quatuor maria;" and in the very next case of Adulterine Bastardy which occurred, viz., of *Pendrell* v. *Pendrell*, in the 5th Geo. II., "it was agreed by Court and Counsel that the old doctrine of being within the four seas was not to take place; but that the Jury were

Case of Pendrell *v.* Pendrell, 5 Geo. II. 1732.

[1] 1 *Strange*, 51.

Case of Pendrell *v.* Pendrell, 5 Geo. II. 1732.

at liberty to consider of the point of access." The facts were these. Upon an issue out of Chancery to try whether the plaintiff was heir-at-law of one Thomas Pendrell, it was admitted that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in London, and he going into Staffordshire; that at the end of three years the plaintiff was born; and there being some doubt upon the evidence, whether the husband had not been in London within the last year, it was sent to be tried. The plaintiff rested at first, upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of non-access; and it was agreed by Court and Counsel, on the trial at Guildhall before Lord Chief Justice Raymond, that the old doctrine of being within the four seas was not to take place; but the Jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. The Chief Justice allowed the defendant to prove the mother to be a woman of ill fame (Salk. 120. Cro. Jac. 541.) But he would not allow the mother's declarations to be given in evidence till she had been called and denied them upon the cross-examination[1]. Various authorities were cited to prove that upon a question of a child's legitimacy, the father or mother having no interest in the cause, may be produced by either side, to prove or disprove the fact and time of marriage[2]. In the *King* v. *Reading*[3], Lord Hardwicke said, "In *Pendrell's Case* the non-access was proved by the husband's relations;" and Sir William Wynne, in delivering judgment in *Smith* v. *Cham-*

[1] 2 *Strange*, 925.

[2] It was said by Lord Mansfield to have been solemnly determined by the Delegates, *Cowp.* 594, *Rex* v. *Reading*, *Rex* v. *Rooke*, &c., that where the child is born in wedlock, the evidence or declarations of the parents seem inadmissible to bastardize such issue.

[3] *Vide postea.*

berlayne[1], said, that "the King's Advocate produced a fuller note of the evidence in *Pendrell* v. *Pendrell*, by which it appeared that some of the witnesses swore that they saw the husband in London, and that the wife herself swore, on being examined, that her husband had actually lain in bed with her, several times about the time of the pregnancy; but it clearly appears that those witnesses were utterly discredited, for it is stated that there was evidence given to the Court, that the husband was a man subject to fits, that he was constantly watched on that account, that he had never been absent from his house in Staffordshire more than a night at a time, and it was impossible that he should have had access to his wife[2]." Justice Buller, in a full note of this case, thus gives the judgment of the Court on it: "The Chief Justice, in directing the Jury, observed that the old maxim of presumption 'intra quatuor maria' was exploded; that the evidence to overturn the presumption need not be so strong as was insisted on by the plaintiff's Counsel; that the evidence was the same in this, as in all other cases; a probable evidence was sufficient, and it was not necessary to prove access impossible between them." The Jury, without going from the bar, found that the plaintiff was a bastard, upon which the Chief Justice commended their verdict[3].

Case of Pendrell *v.* Pendrell, 5 Geo. II. 1732.

This case proved fatal to the old Law of Adulterine Bastardy, into the wisdom or absurdity of which it is not necessary to inquire; but if, as Lord Coke says[4], "The Law doth delight in certainty, because it is the mother of quiet and repose," the rule which prohibited an investigation into the actual paternity of a child born during cover-

[1] *Vide postea.*

[2] *Report of the Gardner Case*, p. 357, and *postea*. Sir John Strange, who reported the case of *Pendrell* v. *Pendrell*, was one of the Counsel in the cause.

[3] *Buller's Nisi Prius*: quoted by the Counsel for the present Lord Gardner, in the *Gardner Case*. *Ibid.* p. 268.

[4] 1 *Inst.* 34 b.

Case of Pendrell *v.* Pendrell, 5 Geo. II. 1732.

ture, if the husband was not separated by divorce, or impotent, or absent from the realm during the period of gestation, was eminently calculated to secure those objects; and, as has been already observed, it may be questioned whether the absurdity and injustice which occasionally attended it, was not more than counterbalanced by the good which it produced in preventing suits, protecting innocent children from being disinherited, and in forming a powerful inducement for husbands to watch vigilantly over the conduct of their wives. The legal profession having, however, long entertained an opposite opinion, the ancient principle has been completely overthrown; and, to use the language of Mr. Justice Grose, the Courts now consider themselves as proceeding upon "good sense, rejecting a rule founded in nonsense[1]."

It is now desirable to inquire, under what circumstances the children of married women have been bastardized, since the alteration took place in the Law of Adulterine Bastardy; or rather, what evidence has been deemed sufficient to rebut the legal presumption that the husband is the father of his wife's child?

Case of Lomax *v.* Holmden, 6 Geo. II. 1732.

The next case, *Lomax* v. *Holmden*, which occurred in Michaelmas Term in the same year, and in the 6th Geo. II., supported the strong presumption of law, that the husband had access to his wife; though it was not held that the husband's absence from the realm, was the *only* evidence by which that presumption could be rebutted. In ejectment, the question on a trial at bar was, whether the lessor was son and heir of Caleb Lomax, esq., deceased? which depended upon the question of his mother's marriage; and that being fully proved, and evidence given of the husband's being frequently in London, where the mother lived, so that access must be

[1] *The King* v. *Luffe*, 8 *East*, 208. *Vide postea*.

presumed, the defendants were admitted to give evidence of his inability, from a bad habit of body. But their evidence *not going* to an *impossibility*, but an improbability only, that was not thought sufficient, and there was a verdict for the plaintiff.

Case of Lomax *v.* Holmden, 6 Geo. II. 1732.

Two years afterwards, a case of Adulterine Bastardy was again brought before the Court of King's Bench, in *The King* v. *Reading*, in Michaelmas Term, 8 Geo. II. A married woman charged the defendant upon oath, with begetting a bastard upon her. The Judges declined giving their opinion, and the second order of sessions adjudged the defendant to be the father. There were other witnesses, who said that the husband was a resident about seven miles from his wife's habitation. Exception was taken that the wife was the only evidence, and that she was not a competent witness in law to exonerate her husband of the expense of this child. Lord Hardwicke, the Chief Justice, said, "The wife is not a competent evidence in point of law in this case, that is, to prove the whole fact; though it seems she may be a competent witness to prove the criminal conversation between the defendant and herself, by reason of the nature of the fact, which, from being usually so secret, admits of no other evidence."—"The wife is here the only evidence to prove the want of access of her husband, which might be made to appear by other witnesses, and therefore the wife shall not be admitted to prove it, since there is no necessity that can justify her being an evidence in this case. In *Pendrell*'s case the non-access was proved by the husband's relations."—His Lordship added, "But the opinion the Court is of at present, will not be a precedent to determine any other case, wherein there are other sufficient witnesses as to the want of access; but the foundation that is now gone upon, is the wife's being the sole witness[1]."

Case of The King *v.* Reading, 8 Geo. II. 1734.

[1] *Reports temp. Hardwicke*, 110.

Case of The King *v.* Reading, 8 Geo. II. 1734.

Sir William Wynne, in giving judgment in *Smythe* v. *Chamberlayne*[1], remarked, in reference to the case of *Rex* v. *Reading*, that "Mr. Justice Buller, in his Law of Nisi Prius, states, that the Judge told the jury that the old notion 'in quatuor maria' was exploded, and that probable evidence was sufficient. Now I do not understand those words, 'that probable evidence was sufficient;' I do not understand the Judge, or Mr. Justice Buller, to have meant, that evidence of whatever kind,—that it was more probable that the child was begotten by some other person than by the husband,—was sufficient; but I take it to be his meaning, that *probable evidence of non-access* was sufficient. This is very much confirmed by the following passage, where the Chief Justice lays it down, 'that probable evidence is not sufficient, and that if you can only prove that it is improbable that, from habit of body, the husband can have begotten the child, and cannot prove it to be impossible, it will certainly not do.' Nothing can more fully establish that, than the case of *Lomax*[2], in which all that is stated to have been proved is, that the husband was frequently in London, where the wife lived, which created the necessary presumption of the access, and put an end to the question[3]."

Upon the case of *Rex* v. *Reading*, it may be observed, that from the vicinity of the husband's residence to that of the wife, it was extremely possible for him to have had access to her, without the fact being susceptible of any other proof, than his or her own statement; and, a fortiori, was the difficulty of establishing a negative. The illicit intercourse, as in cases of actions for criminal conversation, might have been proved by other testimony than that of the wife, and with much greater facility than the non-access of the husband could be established; for he might have come to his wife in less than an hour, be-

[1] *Vide* p. 147, et seq. postea. [2] *Vide* p. 130, antea.
[3] Appendix to the *Gardner Case*, p. 357.

gotten the child, and returned to his own residence in the dead of the night, without the circumstance being known to any other person than the parties themselves; hence the reasoning of the Court does not seem to be very conclusive [1]. So strong, however, was the determination of the Court on that occasion, to establish the new principle,—that non-access might be proved, notwithstanding the husband was in the realm when the child was begotten,—that Lord Hardwicke omitted to notice the legal presumption in favour of access, arising from the husband having always lived within seven or eight miles of his wife; and lest the decision of the Court might support the old doctrine of the "four seas," he added, that "it would not form a precedent to determine any other case, wherein there are sufficient witnesses as to the want of access."

Case of The King *v.* Reading, 8 Geo. II. 1734.

According to Lord Ellenborough's statement, in his speech on the Banbury Claim, the case of *Corbyn* was decided about this time [2] by Lord Chancellor Talbot; but all which is known of that case is to be found in Lord Ellenborough's account of it:—"The parties were," he said, "living under the same roof; they appeared to the world to be living as husband and wife, and to have full opportunities of sexual intercourse, yet the child was declared illegitimate."

Case of Corbyn.

It is very remarkable that the two most important cases of the Law of Adulterine Bastardy, and which have in some measure governed all subsequent decisions, —those of *Hospell* v. *Collins*, and *Corbyn*,—should not be reported [3].

[1] Lord Ellenborough made a similar observation in the *King* v. *Luffe*, 8 *East*. 203.—*Vide* postea.

[2] Lord Talbot held the Great Seal from the 29th of November 1733 until his death, in February 1737.

[3] Mr. Le Marchant says of *Corbyn*'s case, "This case is not reported, and I have not been able to discover it among the *Hargrave MSS.* in the British Museum, or the collection in Lincoln's Inn Library.—*Gardner Case.*

Case of The King *v.* Inhabitants of Bedale, 10 Geo. II. 1737.

In Trinity term, 10th Geo. II., the question of legitimacy was again raised in *The King* v. *The Inhabitants of Bedale.* An order was made upon one Moor, as the putative father of two bastards, born of the body of Elizabeth, the wife of Richard Sharpless : in which it is stated, that for *seven years* and nine months before, the husband had had no access to her, she having never seen nor heard of him all that time, and not knowing whether he was alive or dead, which the justices adjudge to be true, and that Moor is the father of the children, and order him to provide accordingly. Upon appeal to the sessions the case was stated with some variation. It was then said that in 1728 she was married to Sharpless, who was at that time a soldier in Mullings's troop, in a barn, by a person not in the habit of a clergyman; that there had been no access for seven years; but it appearing by a certificate from the Commissary-general's office, dated on the 7th of April 1737, and from the evidence of Simon Clarkson, that one Richard Sharpless, who he was told was formerly in Mullings's troop, was mustered as a private gentleman in the 3rd troop of Horse Guards from the 25th of June 1733 to the 23rd of February 1736, though Clarkson said he could not take upon him to swear that it was the same Richard Sharpless who was pretended to be married as aforesaid. Upon this supposition of the husband's being alive, the sessions were of opinion that the children were not bastards, and reversed the order of the two justices.

It was argued by the Solicitor-general that the second order ought to be quashed, and the original order confirmed. He cited *Pendrell* v. *Pendrell,* and *Lomax* v. *Holmden,* to show, that if the husband was living it was not material, for as he had had no access to his wife for seven years and nine months, the children born within that time are to be considered as bastards.

Case of The King *v.* Inhabitants of Bedale, 10 Geo. II. 1737.

In the argument in support of the original order it was admitted, that the law as now settled was, as had been stated, and that the issue of a married woman may be bastardized, though the husband be within the four seas, contrary to the old rule; but then, it was urged, "the evidence *ought to be very plain*, as particularly that the wife only can be a witness of the act of incontinency. In the present case her evidence only, that the husband had no access, (which was the sole proof upon which the first order was proved) is insufficient.

The Court, which consisted of Justices Page, Probyn, and Chapple, (the Chief Justice being absent,) were clearly of opinion, first, that though the evidence of the wife alone in this case is not sufficient, yet the original order was good, it appearing to be made not only on her testimony, "but on other proof;" and this, it must be contended, was legal evidence; second, that the sessions order was ill, because the only thing they have proceeded upon is the life of the husband, and this is not material, as there was no access by the husband to the wife, which the order admits; and Justice Page cited the Inhabitants of St. Margaret, and of St. Saviour Southwark[1], "where, after solemn debate, it was held that a married woman may have a bastard, if her husband hath no access to her, though he be in England. Besides, the evidence of the marriage and of the life of the man, as set out in the session's order, is imperfect and insufficient." It was then prayed to except to the original order, but the Court refused, because the person charged was not in Court. The Justice's order was therefore confirmed, and the other quashed[2].

The judgment of the Court, in the *King* and *Bedale*, is thus given by another reporter: "But now upon

[1] *Query, Parishes of St. George* v. *the Parish of St. Margaret, Salkeld*, 123. *Vide* antea, p. 121.

[2] *Andrews' Reports*, 9.

Case of The King *v.* Inhabitants of Bedale, 10 Geo. II. 1737.

debate (the Chief Justice absent) the order of sessions was quashed, and the order of two Justices confirmed; for it being stated in both orders, that there was no access, according to the case of *Pendrell* v. *Pendrell*, it was immaterial whether the huband was alive or not: but if it was material, here is no evidence to prove it, the identity not being sworn to; or if it was, yet the evidence of his being alive was improper to have been received, and even the marriage itself doubtful[1]."

Case of The King *v.* Rook, 26 Geo. II. 1752.

The evidence of the wife only, that her husband had no access to her, was ruled by the King's Bench to be insufficient, in the *King* v. *Rook*, in the 26th Geo. II. An order of bastardy was made, that the defendant should pay 20 *s.*, and 1 *s.* 6 *d.* per week to the overseers of the poor of the parish of Kirkby Moorside, in Yorkshire, towards the maintenance of a bastard child, upon the oath of a married woman alone, who swore that her husband was in gaol long before she was got with the bastard child, and ever since, and that she had no access to him, nor he to her, and that Rook begot the bastard. It was objected by Serjeant Agar, that the order ought to be quashed, because a wife cannot be admitted to prove that her husband had no access to her. And so it was ruled by the whole Court; and they cited the *King* and *Reading*[2], in the 8th Geo. II., where Lord Hardwicke said, that although a wife might be admitted to prove the fact of adultery, yet she shall not be admitted to prove that her husband had no access, because that may be proved by other persons; and an order of bastardy could not therefore be made upon her oath alone. The case of the *King* and *the Parish of Bedale*[3] differs from this, for there were witnesses to prove the husband had no access. The Court decided

[1] 2 *Strange*, 1076. [2] *Vide* p. 131, antea.
[3] *Vide* p. 135, antea.

that, as the Justices have determined solely upon the evidence of a wife, the order must be quashed[1].

Case of Day *v.* Day, 1784.

As one of the series of cases connected with the subject, the cause of *Day* v. *Day*, which was first tried in 1784 and again in 1797, must be noticed; but it does not afford much illustration of the Law of Adulterine Bastardy, because the question turned upon the fact, whether the child was the issue of the *mother*, or was *supposititious*? The charge of Mr. Justice Heath, who tried the cause on the last occasion, evinced a very imperfect knowledge of the law; and it almost justified Lord Erskine, who conducted the plaintiff's case, in his severe comments upon it[2].

The facts were these. A Mr. Thomas Day married a person in an inferior station of life, by whom he had a child, that died young. In November 1774 she said she was again pregnant; and on the pretence of wishing to be confined at her father's house, which was in another county, she quitted her husband's residence. On her return to it, in March 1775, she brought with her an infant, of which she stated herself to have been delivered. The husband did not repudiate the child, even if he then, or for some time afterwards, expressed any suspicion about its birth. It continued in his house until the commencement of the year 1776, when in consequence of dissensions between him and his wife, (but it does not appear

[1] 1 *Wilson*, 340.

[2] "The charge of the Judge," he says in a letter to his client, dated on the 3rd August 1797, "is a reproach to the administration of English justice, being, from the beginning to the end of it, a mass of consummate absurdity, and ignorance of the first rules of evidence." Again, on the 12th August in that year, he observed, "I scarcely know how to express the disgust I felt, and still feel, at the most unfounded and unjustifiable charge of Mr. Justice Heath to the jury." So late as August 1819 he told his client, "publish what Mr. Justice Heath *did actually say*, the whole of it, which, in my opinion, was most unjust, ignorant, and contrary to his duty;" and Lord Erskine repeated his opinion in January 1820, and in February 1823.—*Vide* Report of the Case of *Day* v. *Day*, 8vo., third edition, 1826, pp. 331, 332. 336.

Case of Day *v.* Day, 1784.

that the disagreement was in any way connected with the child) it was put out to nurse, unknown to Mrs. Day, and was thenceforward brought up at the house of a man of the name of Beaumont.

Mr. Day separated from his wife in 1777; after which time doubts arose in his mind about the birth of the child, and he refused to allow her a maintenance, until she satisfied him on the point. She consequently told his solicitor that the child was not hers; and soon afterwards made an affidavit, that she was informed that her child died, and that the infant which she had introduced as her own, was the child of one of her relations, which statement was confirmed by the affidavit of her mother.

Mr. Day died in 1783, and in his will described the child in these words: "My son Thomas Day, who now and some time past hath been a boarder with Thomas Beaumont, of Biggleswade, butcher." The trustees for Thomas Day, the child in question, entered into possession of all Mr. Day's entailed estates, except about one hundred acres of copyhold, into which Mr. John Day, the brother of the deceased, entered as heir at law, on the ground that the said child was not the son of his brother. Mr. John Day, the brother, brought an action in ejectment, for the recovery of the property of which the trustees of the child had possession, which was tried in 1784 before Lord Loughborough, at Huntingdon. A great deal of evidence was adduced to prove that the defendant was a supposititious child; and notwithstanding it was rebutted by several witnesses, who swore to the wife's pregnancy before she left home, to her having suckled the infant on its return, and to the recognition of it by the father, as his child, there can scarcely be a doubt that the child was supposititious. On that trial Mrs. Day was herself examined, and swore "that she was brought to bed of a boy," and that "it was the same child as was then in possession of her husband's

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estate." Lord Loughborough, in summing up, said, that the evidence for the plaintiffs was circumstantial only, and not positive; that it required an accumulation of evidence to prove a negative; that the plaintiff, in substance, asserted that the defendant was not the child of Mr. Day, and that he must therefore make out that case by the clearest evidence; that if the plaintiff could show where Mrs. Day got the child, it would be a different consideration; that the cause affected the interests of society, for the child being in possession of the character of the son of Thomas Day, having been brought up and acknowledged as such by Mr. Day, and having been received by the world as his son, Mr. Day must be deemed the parent, unless some other parent could be clearly assigned for the child; and that Mr. Day's will spoke the language of parental affection, there being no legacy or bequest from the child. His Lordship proceeded to observe, that beyond a doubt it was given out that Mrs. Day went into Staffordshire to lie in: he ascribed Mrs. Day's contradictory stories and strange conduct to a distracted state of mind; and strongly recommended the jury to find a verdict for the defendant, notwithstanding the improbable account given by Mrs. Day, and by the other witnesses, of the birth of the child. A verdict was consequently found for the defendant.

In 1785, two of the principal witnesses for the defendant "stung, as they alleged themselves to be, with remorse of conscience," voluntarily stated that what they had sworn on the trial was false. Pecuniary embarrassments, however, prevented the brother from renewing his efforts to recover the estates; but his son brought another action in ejectment, which was tried at Huntingdon in 1797, before Mr. Justice Heath and a special jury. The evidence adduced in favour of the plaintiff was strong; but a prejudice prevailed in the neighbourhood against his claim, arising from the youth, respectable character,

Case of Day *v.* Day, 1797.

and long possession of the defendant, to whom the lands had been confirmed by the trial in 1784. The mother, Mrs. Day, was not then living; and the evidence which she gave on the former trial was not produced. The jury found for the defendant; and as the case is fully reported, it is unnecessary to comment upon it further, except to notice the fact, that the Judge not only allowed evidence to be given, that the defendant bore a strong personal resemblance to his supposed father; but in summing up, he told the jury, that "the next head of evidence is made very light of indeed; that is, the resemblance of the defendant to his father, or supposed father. I do admit, those resemblances are frequently fanciful, and therefore you should be well convinced it does exist; but if you are convinced it does exist, it is impossible to have stronger evidence[1]."

[1] "Cause of *Day* v. *Day*," 8vo. p. 327. It appears from the following passage in Dr. Paris and Mr. Fonblanque's able work on *Medical Jurisprudence*, vol. I., p. 220, that Lord Mansfield attached much weight to the personal resemblance between children and their parents, to which fact Mr. Justice Heath alluded:—

"We should not have alluded to personal resemblance between parents and children, as a mode of proof in these cases, first, as we have doubted whether such proof can be satisfactory, and secondly, as it may not be considered a point of medical evidence; but as to our first doubt, we find that so high an authority as Lord Mansfield thought, that a family likeness was a material proof that a child was the genuine offspring of the parents through whom he claimed. His Lordship, in delivering his judgment in the House of Lords in the *Douglas Cause*, is reported to have said, 'I have always considered likeness as an argument of a child's being the son of a parent; and the rather, as the distinction is more discernible in the human species than other animals: a man may survey ten thousand people before he sees two faces perfectly alike; and in an army of a hundred thousand men, every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gesture, the smile, and various other characters; whereas a family likeness runs generally through all these, for in every thing there is a resemblance, as of features, size, attitude and action. And here it is a question, whether the appellant most resembled his father, Sir *John*, or the younger, *Sholto*, resembled his mother, Lady *Jane?* Many witnesses have sworn to Mr. *Douglas* being of the same form and make of body as his father; he has been known to be the son of Colonel *Stewart*, by persons who had never seen him before; and is so like

Case of Day v. Day, 1797.

Mr. Justice Heath laid down "the principles of law upon which the jury were to determine the case," in the following brief and unsatisfactory manner:

"The legitimacy of children depends upon the conduct and behaviour of their parents. The only irresistible proof of legitimacy is, that they have been so treated by their parents. However, there is in the history of mankind proofs to the contrary; that persons have been so wicked, that when they have had no issue of their own, they have adopted others to answer some sinister purpose; but the conduct of parents affords such strong presumptions, that unless their conduct be clearly proved, it ought to prevail; it is that which least can deceive[1]." The only other legal point stated by Mr. Justice Heath was on the effect of the conduct of parents to their children. He said, "I have no doubt at all the legitimacy of children must depend upon the declaration, and the mode in which they are treated by their parents. If the evidence of the declarations of the parent, that the defendant was her child, is good, so on the other side are the declarations he was not. I would not admit evidence, to be sure, to show that; she is not supposed to give any evidence to any other fact except to being brought to bed; it shows in what manner the supposed parent observed the defendant; that will show us how she demeaned herself[2]."

his elder brother, the present Sir *John Stewart*, that, except by their age, it would be hard to distinguish the one from the other. If Sir *John Stewart*, the most artless of mankind, was actor in the *enlevement* of *Mignon* and *Saury*'s children, he did in a few days what the acutest genius could not accomplish for years; he found two children, the one the finished model of himself, and the other the exact picture of Lady Jane. It seems nature had implanted in the children what is not in the parents; for it appears in proof, that in size, complexion, stature, attitude, colour of the hair and eyes, nay, in every other thing, Mignon and his wife, and Saury and his spouse, were, *toto cœlo*, different from and unlike Sir John Stewart and Lady Jane Douglas.'"

[1] Cause of *Day* v. *Day*, 8vo., third edition, p. 318.

[2] *Ibid*, p. 112.

Case of The King *v.* Inhabitants of Lubbenham, 1791.

In May, 31 Geo. III. the case of *The King* v. *The Inhabitants of Lubbenham* occurred, which was one of settlement. One Elizabeth, a pauper, seventeen years before, married Thomas Hutchins, who was convicted of a highway robbery two years after his marriage, but pardoned, on condition of enlisting as a soldier. He went abroad, and five years afterwards, his wife, having heard that he was dead, married by bans, one Thomas Ponton, at Lubbenham, by whom she had a daughter called Hepziba, who was born during their cohabitation, and baptized as the child of the said Thomas Ponton, and Elizabeth his wife. About twelve months after the birth of the child, Hutchins, the first husband, returned; and the question therefore was, whether the child must not be considered by law to be the child of Hutchins? Lord Chief Justice Kenyon decided that the fair conclusion from all the facts was, that it was a bastard; and Mr. Justice Buller said, "The first point that I shall consider, is the situation of the daughter, who must be taken to be a bastard on the facts disclosed in this case. It must be recollected that we do not proceed by the same rules when we are determining on an order of sessions, as on a special verdict, when we could not say that this child was a bastard, unless the jury had found her to be so; but in cases made at the sessions, we are to consider those points which the Justices made below, and to assist them in drawing the conclusion which they should have drawn; and on this evidence there is no doubt but the child is a bastard; she was even so considered by the parents themselves, who baptized her as their child." He added, "The second marriage is bad in point of law, and consequently the woman must be considered as the wife of her first husband[1]."

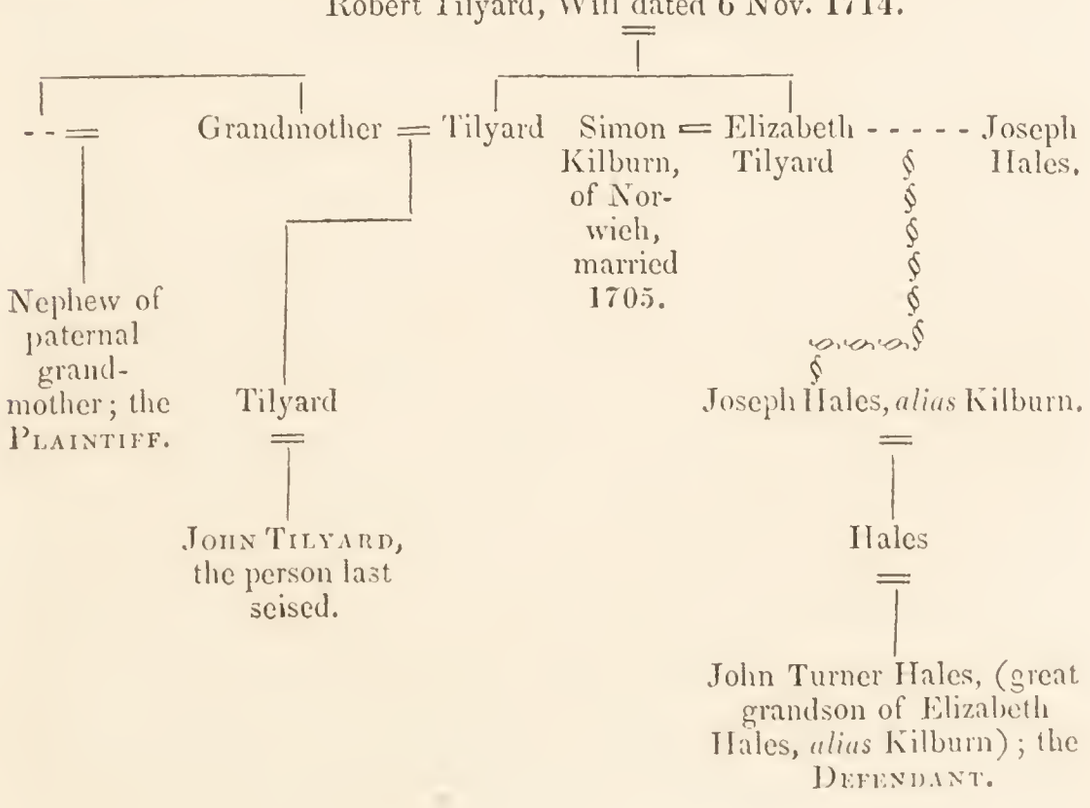
[1] 4 *Term Reports*, 251.

Case of Goodright *v.* Saul, 1791.

In the same year in which that case was decided, namely, in the 31st Geo. III., the important cause of *Goodright* v. *Saul* was brought before the Court of King's Bench, upon a rule *nisi* to set aside a verdict of the jury at the assizes. The facts of the case were these:

John Tilyard died seised of certain lands, and the question was, who was his heir at law? The plaintiff claimed as nephew of his paternal grandmother, whilst John Turner Hales pretended to be the great grandson of Elizabeth Tilyard, daughter of Robert Tilyard, and sister of the said John Tilyard's grandfather. The point at issue was whether Joseph Hales, the defendant's grandfather, was the legitimate son of the said Elizabeth Tilyard[1]? It appeared in evidence that Elizabeth Tilyard was married in 1705 to Simon Kilburn, of Norwich, with whom she lived for some time in that city, without having any children; that Kilburn then left Norwich, after which time his wife lived publicly with one Joseph Hales, as man and wife, for some years,

[1] The annexed Table will more clearly show the relative position of all the parties:



Case of Goodright *v.* Saul, 1791.

during which time the plaintiff's grandfather was born; who, it was proved, was always considered in the Hales family as a bastard. He always bore the name of Hales, except on one occasion, when he sold an estate after his mother's death, which had been devised to her by her father Robert Tilyard, and in the title deeds of which he styled himself "Joseph Kilburn, otherwise Hales." It did not clearly appear where Kilburn the husband was, during his wife's cohabitation with Hales, but a very old witness said that he went to London, where it was supposed he remained. No marriage between the wife and Hales was proved, and it was shown that she was buried by the name of Kilburn. The defendant produced a pedigree found in the late John Tilyard's house, whence it appeared that Joseph Hales, the great grandfather, had had issue Joseph Hales, the defendant's grandfather; and it was also proved that Robert Tilyard, the father of the said Elizabeth, by his will, dated 6th November 1714, called his daughter "Elizabeth *Hales*," and that several other family wills described the Hales' as cousins. Some expressions of the late John Tilyard were also proved, acknowledging the defendant to be his heir at law; but it appeared that these, as well as the pedigree above mentioned, arose from the passage in Robert Tilyard's will, wherein he called his daughter "Elizabeth *Hales*;" and there were likewise similar expressions of John Tilyard, as to the acknowledgment of his heir at law, in favour of the plaintiff. Finding the evidence against the legitimacy of Joseph Hales, as the son of Joseph Hales and Elizabeth Tilyard, to be irresistible, and that her marriage with Kilburn was clearly established, the Counsel for John Turner Hales, the grandson of that person, changed their ground, and contended that the said Joseph Hales was the lawful son of her marriage with Simon Kilburn; for that, unless

non-access of the husband was fully proved, which had not been, nor could be done, it must be taken that Joseph the son, whatever his reason might have been for taking the name of Hales, must, in point of law, be held to be the son of Kilburn, and could not be bastardized by mere evidence that another person had cohabited with his mother. Judge Ashurst, who tried the cause, directed the jury to that effect, telling them, that though it was not absolutely necessary to prove the husband out of the realm, in order to bastardize the issue, yet that it was incumbent on the party insisting upon that fact, to prove that the husband could not, by any probability, have had access to his wife at the time, which he conceived had not been shown in the present instance. The jury accordingly returned a verdict for the defendant, thus finding that he was the son of Kilburn the husband.

As the Judge allowed the jury to determine whether it was *probable* that the husband had access to his wife, at the time when the child was begotten, it is difficult to imagine how they could have considered that there was any *probability* of that fact, under the circumstances which had been proved; and nothing but the legal presumption in favour of legitimacy, and the ancient rule that that presumption could not be rebutted by any other evidence than the impotency of the husband, or his absence from the realm, or a divorce, could justify their verdict; for there was, in this case, separation, living in adultery, reputation, the name of the child being that of the adulterer, and, in the first instance, a claim to be the legitimate issue of the adulterous connection.

A new trial was, as might be expected, moved for, on the ground that the circumstances given in evidence, were fully sufficient, at this distance of time, to prove the bastardy of Joseph Hales; and that it was not indispensably

Case of Goodright *v.* Saul, 1791.

necessary to prove that, by no possibility, could the husband have had access to his wife; that the will of the father, Robert Tilyard, wherein he called his daughter Elizabeth Hales, the notoriety of Hales's cohabitation with her, the probability of the husband's absence during the time, the reputation in the family of the child's being a bastard, and the circumstance of his, and his posterity having adopted the name of the putative father, formed altogether ample grounds for the jury to conclude that he was illegitimate. The Counsel in support of the verdict had only proceeded so far in his argument, as the deed in which Joseph Hales had described himself by the name of Kilburn, which he submitted was strong to show his legitimacy, when he was interrupted by Mr. Justice Ashurst, who, after consultation with the rest of the Court, said, that he was of opinion that there ought to be a new trial; that he was convinced he had laid too much stress upon the necessity of proving non-access, when the husband was within the realm, by witnesses who could prove him constantly resident at a distance from his wife; that in this case the husband left the wife, and went to reside at another place, as it was believed, in London; that there was no direct evidence of his access was very clear, and that there were other circumstances which went strongly to rebut the presumption of access, and to show that the son was a bastard; among others, a very forcible one occurred, that of the son's having taken a different name from his birth, the name of the person with whom his mother was living at the time, and which had been retained by him and his descendants ever since, which was a very strong family recognition of his illegitimacy. The rule for a new trial was therefore made absolute[1].

[1] 4 *Term Reports*, 356. Sir William Wynne, in giving judgment in *Smyth* v. *Chamberlayne*, reviewed this case at considerable length, and said he

Case of Smyth *v.* Chamberlayne, 1792.

The law of Adulterine Bastardy received considerable elucidation in 1792, from the able and elaborate judgment of Sir William Wynne, Dean of the Arches [1], in the case of *Smyth* v. *Chamberlayne*, which "was a cause [2] in the Prerogative Court of Canterbury, for the administration of the effects of John Newport, esq., who had died intestate. The sole question was respecting the legitimacy of the deceased. Ralph Smyth claimed as his next of kin against the King's proctor, who sought to establish a bastardy.

"John Newport was the only son of Ann, the wife of Ralph Smyth, eldest son of William, Lord Bishop of Raphoe. He was born whilst his mother (being separated from her husband) was living with Lord Bradford as his mistress, and he had been bred up and educated by that nobleman as his son; he had inherited a splendid fortune from his reputed father, and had assumed his name [3] under an Act of Parliament. Ralph Smyth had separated from his wife some years previously to the birth of Mr. Newport, and they continued to live apart ever after. He occupied a single apartment in an obscure lodging in Holborn, whilst she maintained two expensive establishments in the west end of London and in Hammersmith. It appeared, that they had occasional interviews for the payment of a small annuity, which he had engaged to allow her when they

thought it clear, that if it had been proved that Kilburn resided at Norwich during his wife's cohabitation with Joseph Hale, access must have been presumed.—*Report of the Gardner Case, Appendix*, p. 359.

[1] This eminent judge, and distinguished lawyer, died on the 12th of December 1815, aged 87. He was Dean of the Arches from 1788 to 1809. *See* some account of him in the *Gentleman's Magazine*, vols. LXXXV. part ii. p. 573; LXXXVI. part i. p. 16.

[2] The papers from which this Report was compiled were communicated to Mr. Le Marchant by Messrs. Gostling & Sons, of Doctors' Commons, and the extracts in the text are taken from Mr. Le Marchant's *Appendix to the Report of the Claim to the Barony of Gardner*.

[3] Newport is the second title of the Earl of Bradford.

Case of Smyth *v.* Chamberlayne, 1792.

separated, but none of these interviews were alleged to have occurred within a considerable period of Mr. Newport's birth. Both parties acted as if their marriage had long been dissolved. He rather promoted than interrupted her commerce with Lord Bradford, and he was never known to take the slightest notice of Mr. Newport. Mr. Newport, upon his return from his travels, sunk under a mental disorder, to which the two brothers of Lord Bradford had been already victims. The jury that found him a lunatic, also found that they did not know who was his heir at law. His property was placed under the administration of the Court of Chancery, and suits were instituted respecting it, to which Ann Smyth, as a legatee under Lord Bradford's will, and Ralph Smyth, as her husband, were made parties. The latter had frequent opportunities of recognising Mr. Newport as his son, and would have derived great pecuniary advantages from the existence of such a relation between them; but he studiously avoided any declaration to that effect, and he both acted himself and allowed the Court to act, as if no doubt could be entertained of Mr. Newport's illegitimacy. Mr. Newport was placed by the Court, as long as he lived, under the superintendence of some of the members of Lord Bradford's family. He survived his mother and her husband, and died in 1784, possessed of property, which the accumulations of interest during his lunacy had increased to an immense amount. The claimant (Smyth) was the grandson of a brother of Ralph Smyth."

The cause was argued by Sir William Scott, Dr Harris and Dr. Crompton, for the claimant Smyth, and by the King's Advocate on the part of the Crown.

" On the 4th of December 1792, the judgment of the Court, as far as it related to the legitimacy of the deceased, was delivered by Sir William Wynne, who,

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after first addressing himself to the subject of the jurisdiction of the Court to determine the question, proceeded thus:

"There are two questions which arise; 1st, whether the law will admit of an averment that the child of a married woman, born during the life of her husband, was not begotten by her husband? and 2ndly, if such an averment is by law admissible, whether it is in the present case proved? Without doubt the rule of the law of England, with respect to the children of a married woman, is the same as that of the civil law, and must be the same in every country, 'pater est quem nuptiæ demonstrant.' But though this is the law of England as well as of all other countries, it has always admitted of some exceptions. I shall not think it necessary to inquire into those ancient writers on the law of England, which have been mentioned. I only begin with the law as stated by Lord Coke, in his Comment on Littleton, p. 244; he states the law to be in these words, 'If the husband be within the four seas,' that is within the jurisdiction of the law of England, 'if the wife has issue, no proof is to be admitted to prove the child a bastard (for in that case, 'filiatio non potest probari,' unless the husband has an apparent impossibility of procreation).' Rolle[1] lays it down more strongly, and there are several passages in his work to the same effect. Now, it appears from those passages that the two exceptions to the rule, namely, that of the husband being beyond the seas, and an apparent inability of procreation, are laid down by Lord Coke and Rolle, not by way of instances liable to be extended, but as confining the exceptions strictly to those two. Lord Chief Justice Hale appears to be the first authority for extending the instances of exception. It was his opinion that if the jury found by special verdict

[1] 1 *Abrid.* 358.

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that the husband had no access, then the child would be a bastard[1]. And the same rule may be inferred from the case of *St. George's* v. *St. Margaret's*," &c.

Sir William Wynne then adverted to, and commented upon, that case[2] and the cases of *Pendrell* v. *Pendrell*, *The King* v. *Reading*, *Lomax* and *Holmden*, and *Goodright* and *Saul*.

" The civil law, especially the commentators, are certainly much more lax on this subject; Menochius in particular[3]. The King's Advocate did not think fit to cite this authority, and I am sure he would not have taken upon him to maintain that this was the law of England. I am sure he would not enforce such a doctrine, for it is this: if a woman cohabits with an adulterer, and the husband has access to her, though it be but seldom, in that case the Court are to presume that the child is begotten by the adulterer, and not by the husband. The law of England, therefore, on this subject, as now settled, I take to be this: that if such proof can be given, of whatever kind, as shall satisfy legally the mind of the Court that the husband had no access to the wife at the time when the child must have been begotten, the child is a bastard, though born of a married woman in the lifetime of her husband; but if the husband and wife were so circumstanced that access between them must be presumed, as if they lived in the same town or place, and cannot be proved by persons who have watched them never to have come together; if direct evidence can be proved that they had access to each other; in such a case I take it the son is legitimate, not-

[1] " *Dickens* v. *Collins*, cited in *St. George's* v. *St. Margaret's*, 1 *Salk.* 123. Probably the case mentioned in the debates on the Banbury claim, under the title of *Hospell* v. *Collins*."

[2] Sir William Wynne's remarks upon those cases have been added to the notices of them, *antea*.

[3] 6 & 63 *Pres.* 19 sec.

withstanding any circumstantial evidence that may be given to the contrary. It remains, then, to be considered whether the point of illegitimacy, as set up by the Crown, is supported by legal proof."

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He then alluded to the facts of the case, and quoted copiously from the evidence produced.

" Thus then stands the evidence of access between Ann Smyth and Ralph Smyth her husband: he is proved to have been in London at Mr. Darling's, to have written and received letters in that place from the month of April to the month of June 1720. Ann Smyth was delivered of the deceased in London, in Martlet-court, Covent Garden, in February 1720–21. She had a house in Maddox-street in September 1722, and in King-street, Golden-square, in 1724; and if we except the inconsistent and imperfect recollections of Mrs. Ellard, there is not the least evidence of her having ever resided anywhere but in London, Hammersmith and Chelsea, from 1708 to 1724. If the evidence had rested here it would, I think, fall very little if at all short of the case of *Lomax* v. *Holmden:* here the husband is proved to have been resident in London in 1720; the wife was delivered in London in the same year, and there is every reason to believe that her usual residence was at that time in London likewise. But the evidence in this case goes a great deal further; for from the time that Margaret Holmes first knew Mrs. Smyth, which must have been before the deceased was four years old, she proves Mrs. Smyth had a constant residence in London; and the depositions of Martha Cleeter and other witnesses establish that Ralph Smyth went, in 1727, to lodge in Warwick-court, and continued there till his death in 1755; and here I think there is a direct and full evidence of his having had frequent access to his wife.

" These depositions form a chain of evidence amount-

Case of Smyth v Chamberlayne, 1792.

ing, in my opinion, to a direct and full proof that Ralph Smyth had access to his wife, at the times mentioned by the witnesses. It was said by the counsel, that by the word access in the cases that have been mentioned was meant nuptial access, and that it was not sufficient to prove that they were together, if there was not sufficient ground from circumstances to believe that they had conversed as husband and wife. But I do not find the least assertion of this doctrine in any case. I take it that it has always been held to be sufficient, if it could be proved, that the husband and wife had been together, or that they *might have been* together by being frequently in the same town or place; and in *Lomax*'s case there is a pretence of evidence, that they were never at the same house, only that the wife resided in London, and the husband was proved to have been frequently there. But in the present case, to be sure, it is a great deal stronger, for Thompson says, they were together without any other witnesses frequently in her house, in the bed-chamber, upwards of half an hour together. Now there being such evidence therefore, both presumptive and positive, of the access of the husband to the wife, I consider the circumstantial evidence (however strong it may be), that the deceased was not begotten by the husband, but by another man, insufficient to rebut it.

" The counsel for the next of kin have justly observed, that the criminal intercourse of Mrs. Smyth with Lord Bradford is very slightly proved by direct evidence. It can only be inferred from the general reputation of her being his Lordship's mistress, and of the deceased being his Lordship's son : in short, from circumstantial evidence alone ; from the will of Lord Bradford ; from the expensive manner in which he was bred up, and from his taking the name of Newport by Act of Parliament ; and it must be admitted that there can be no doubt that the

Earl of Bradford did believe the deceased to be his own son, which gives strong probability to suppose that it was so. Yet, when you consider the circumstances of the case, there are facts that do certainly detract from that probability; such as the constant communication between the parties, and the secrecy with which it was attended, and more especially the nature of the separation. It has been truly observed, that there is no evidence to show that they parted with feelings hostile to each other, or that they ceased to live on an amicable footing. The instruments executed by Ralph Smyth in 1708, 1711, and 1728, giving up all right in his wife's property, appear to have been voluntary acts; and although they may have been prompted by no very honourable motives, they surely indicate the absence of animosity towards his wife. We must also recollect that he acquiesced in her living with Lord Bradford, and that he never lost the power of calling upon her to cohabit with him, or took any steps for obtaining a separation.

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" The circumstances that have been principally relied on in this case are the declarations. There is one declaration, which is an affidavit of Mary Prole, who says, ' she knew Ann Smyth when she was the mistress of Lord Bradford, and heard and always understood from her, that she had no lawful issue, but that she had a son who was the illegitimate child of Lord Bradford.' Then there is the answer given in by Ralph Smyth in Chancery, to the bill of revivor brought after the death of Ann Smyth, in which he notices the deceased as ' a person called in the said bill John Newport,' and afterwards says, ' he does not know who is the heir at law of Ann Smyth,' which would not have been true if he had regarded the deceased as legitimate; and lastly, his recognising the proceedings in Chancery respecting the lunacy of the deceased, which abound with the most distinct

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and unequivocal statements of his being illegitimate. All this has been urged to be a direct disavowal by the husband and wife, in proof that the deceased was not their son. But this disavowal by the father and mother was not, I conceive, such as they were by law allowed to make. Lord Mansfield says the law of England is clear, that the declaration of a father or mother cannot be admitted to bastardize the son born after marriage; and this is a rule, notwithstanding what has been said of it, which in my apprehension is entitled to the utmost deference, not only from the authority which belongs to every thing delivered by that great Judge, but from its conformity with the earlier decisions, and its tendency to preserve order, and to prevent confusion, in the descent of property and in the administration of justice. It is a rule, not only in the law of England, but in the 47th Title. It may at first sight appear oppressive to the husband, but we should recollect that a husband who is injured by his wife may obtain a separation from her, and thereby escape all danger of a spurious progeny. If a husband connives at his wife living with another person, he exposes himself to the consequences of such baseness, and access must be presumed, in the absence of proof to the contrary. This is not the only case of a similar nature in which the law rejects evidence opposed to a presumption, though such evidence shall amount altogether to full proof. If a woman, big with child by A., be married to B., it is clear that the latter becomes the legal father[1]. And let no one reproach the law; the rules it has laid down have been wisely framed for the security of families, for the protection of marriages, and for the general extension of public convenience. It is an evil inseparable from the most perfect of human institutions, if, in particular circumstances and

[1] *Rolle*, I. 358.

to particular persons, they may operate to mischief. Some late cases have been mentioned, where children presumed to be adulterine bastards have been bastardized by the Act of Parliament which dissolved the marriage of the mother. But those being cases of Acts of Parliament alone, and not of sentences in a court of justice, they cannot be used as precedents here.

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" Upon the whole, I am of opinion, that from the proofs in the cause, the mother of the deceased must be presumed to have had access to her husband, at the time she became pregnant of the deceased; and consequently the deceased must be considered to be legitimate, and not a bastard. I therefore pronounce for the interest of Robert Waller and James Smyth, as the representatives of James Smyth, the next of kin of the deceased."

By this decision, the strong presumption of law, in favour of the access of the husband, when not separated by considerable distance, or divorce, or incapacitated by bodily infirmity, was confirmed rather than weakened; and it seems to have been then held, that if such access could, *by any possibility*, have taken place, nothing would prevent the child from being considered the son of the husband.

Case of Routledge *v.* Carruthers, 1806.

Ably as the law of illegitimacy has been described in the judgments of some of the Courts in this country, the subject was perhaps most philosophically and elaborately discussed, with relation to the principle upon which the law is founded, in the case of *Routledge* and *Carruthers*[1], which was brought before the Court of Session in the year 1806, and was confirmed upon appeal to the House of Lords, in June 1816.

[1] The following account of this case is also taken from Mr. Le Marchant's Appendix to the *Report of the Gardner Case*.

Case of Routledge *v.* Carruthers, 1806.

In the year 1731, Francis Carruthers, esq., of Dormont, married Margaret, eldest daughter of Sir William Maxwell, bart. Nine years afterwards, Margaret Maxwell was discovered to have carried on an adulterous intercourse with several individuals of very low rank, one of whom was a menial servant in the family. Mr. Carruthers was often obliged to be abroad on business; and in the beginning of the month of August 1740, he left his home, and did not return to it until the following November, during which interval his wife and himself continued always apart. It was only on Mr. Carruthers' return to his home in November that he received the intimation of his wife's infidelity, and of its consequences, as he discovered that she was now, for the first time, pregnant. A separation immediately took place, and the injured husband instituted proceedings in the Ecclesiastical Court for a divorce. Before the sentence could be obtained, his wife was delivered of a daughter on the 28th day of May 1741. Mr. Carruthers was only partially relieved by the divorce; further steps were necessary for dissolving the tie between him and the child born during his marriage. The child was placed at nurse and supported, during infancy, by Mr. Carruthers, and when she was seven years old he placed her with a farmer in a remote part of Cumberland, where she was treated as a domestic, and called by the name of Betty Robson. She was never once seen by Mr. Carruthers, or acknowledged as his child. In the year 1758 the child intermarried with Henry Routledge, the son of a neighbouring farmer, and having gained some information of the rights that accrued to her as the issue of the marriage of Mr. and Mrs. Carruthers, she, in the same year, sued the former for the sum of 1,000 *l.*, which she alleged to be due to her under the marriage settlement. A condescendance was

Case of Routledge *v.* Carruthers, 1806.

given in and proof adduced, that Mrs. Carruthers was delivered of a female child on the 28th of May 1741, and that the pursuer was that person. When the cause was in this state, the parties agreed to settle the matter without further legal proceedings, and Mrs. Routledge executed a deed, releasing all right of succession or other claim which she could or might have under the settlement. In the year 1806 the issue of Mrs. Routledge brought a suit in the Scotch courts for setting aside this release, and for the recovery of the hereditary estates of Mr. Carruthers.

The case was argued at great length. It turned on two points: one, the legitimacy of Mrs. Routledge; and the other, the effect of the deed of release. The opinions of the Judges, as far as they related to the former point, are as follow:

[1] Lord Craig:—I have no doubt of this child's legitimacy. That her mother was a bad woman, and was on many occasions guilty of adultery, is certain; but on the other hand, it is perfectly clear, that this lady must be held to have been the lawful and legitimate daughter of her parents. The maxim 'pater est quem nuptiæ demonstrant' is founded on reason and expediency; and in this case, however great may have been the guilt of the mother, however uncertain it may be who was the real father, still at the time the child was begotten the parents were married, and there was no defect stated, no physical impossibility from distance or otherwise, of the husband being the father. It would be most dangerous, in circumstances of that nature, to enter into any investigation or into any proof that the child was not a lawful child. The law holds that she was lawful on good prin-

[1] Mr. Le Marchant says, "The MSS. from which these judgments were transcribed, were communicated to me by Messrs. Spottiswood and Robertson, of Great George-street, whom I take this opportunity of thanking for their assistance."

Case of Routledge *v.* Carruthers, 1806.

ciples, and it would be attended with the worst consequences to institute any inquiry that must shake the security of marriages. It is said that the father was from home some forty or fifty miles. It is not stated when he went away or when he returned, and therefore it is clear in law, in reason, and in expediency, that this child must be held to be legitimate.

Lord Succoth :—Although I concur entirely in the opinion just delivered, yet I think it proper in a case of such importance as the present to state the grounds on which I come to that conclusion; and it is the more especially necessary in this case to do so, because we are told that that opinion is contrary to cases which have been solemnly decided in this Court. I shall take up very little time with the question of legitimacy, because it does not appear to me to be attended with any difficulty: connected with that question, is the question of identity, on which I shall say nothing, except that I think it clear that the mother of the pursuer was the child born of Mrs. Carruthers, of Dormont, during the dependence of the process of divorce. With regard to the legitimacy, I concur entirely in the maxim 'pater est quem nuptiæ demonstrant,' which is founded on strong reasons of policy as well as of law, and cannot be got the better of, unless it be made out clearly that there was an impossibility of the husband being the father of the child. In this case I do not think that this is clearly made out; I think it necessary, in order to get the better of that sound and salutary maxim, that the husband should be clearly established to have been absent from his wife for a considerable time both before and after the birth of the child, and at such a distance as rendered any connection impossible. I do not think that either the one or the other of those points has been proved. As to the first, we have the evidence of two or

three witnesses, and the one that swears most distinctly, states that the husband left home about the term of Lammas, which may apply to a few days after it. In this respect the proof is by no means precise, but it is still more deficient in the other particular, and certainly does not show that the husband was at any very great distance from his wife. I do not know that it is the law of this part of the island, that the husband must be beyond seas, but at all events it is necessary that he should have been at such a place, or at such a distance from the wife, that any intercourse was impossible. It is said that he had gone to England, but your Lordships see that his own house is not far from the border, and that in the course of a very few hours he might be both in England and at home. The proof, therefore, is not sufficient upon that point.

Lord Woodhouselee:—Whatever doubts I may have in my own mind, whether the pursuer's mother was really the daughter of Mr. Carruthers, I have at least no doubt as to the law which must presume so, unless circumstances be proved which render it impossible for him to have had connection with the mother, at a time that would account for the birth of the child. No such circumstances have been proved; Mr. Carruthers was married to the child's mother, and the presumption of law arising from the father living and cohabiting with her ten months before the birth, is conclusive. It does not take off this presumption, that acts of adultery have been proved against the woman during that period; for the law, notwithstanding, gives effect to the presumption, which nothing short of impossibility is sufficient to overturn. I cannot conceive myself at liberty to make any doubts of my own the ground of deciding the question; the law holds this child to be in possession of its legal *status*. It is plain that the full period of maturity, ten

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months, is sufficient to bring it within the time of the husband's cohabitation with the wife.

Lord Bannatyne:—Upon the first question, namely, the legitimacy of this lady, I have no doubt. It is the presumption of law that she is legitimate, and there is nothing proved in evidence to take off that presumption; indeed the father acted as if he himself was convinced that she was his lawful daughter, for if she was not, she was not entitled to grant the discharge[1].

Lord Balmuto gave his opinion to the same effect.

Lord President Blair:—[2] This is a case of considerable moment to the parties, and also as being connected with several important branches of the law. I shall therefore give my opinion fully upon the several questions that have been agitated, taking care to avoid repetition as far as that is practicable where different Judges are speaking to the same points. The first question in this case is the legitimacy. This gentleman, Mr. Routledge, comes before us claiming as heir under the marriage contract entered into between Francis Carruthers and his spouse in the year 1735. In order to make out his claim, it is necessary to prove that he is a lawful descendant of that marriage; not an immediate descendant, but that he is the grandson of the parties, or the son of one who, he must show, was an immediate lawful descendant from them.

The 'onus probandi' lies upon this gentleman, and in what manner does he make it out? With respect to his own legitimacy there is no doubt; but this is not enough,

[1] Mr. Le Marchant observes, "With great deference to the learned Judge, the acts of the father, if father he can be called, create a very different presumption. He never recognized the child, and he accepted the discharge in order to be more satisfactorily secured from claims, which, however unjust, might still be successful."

[2] "The copy from which the text is taken was revised by his Lordship." —*Le Marchant.*

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he must show that his mother was a lawful child of the marriage betwixt Francis Carruthers and Margaret Maxwell, who were the parties to the contract under which he claims. Now in what manner is this proved? We have direct evidence that Margaret Maxwell (Mrs. Carruthers), during the subsistence of the marriage, on the 28th of May 1741, was delivered of a female child, and it is proved beyond a doubt, by a very singular concatenation of circumstantial evidence, that the mother of this gentleman is that identical child born under such inauspicious circumstances; the child of misfortune we may call her from her infancy, tossed about by various casualties till at length she is married. Then it being proved that this child was born of Mrs. Carruthers, there the proof stops, and there it must stop in every case, because it never can go further. It is proved that during the marriage she was delivered of this child; and in place of pursuing further, the pursuer refers to the legal maxim which I say is the foundation of every man's birth and *status*; his birth is a fact that may be proved by witnesses, but the conception is a fact which never can be proved, and he therefore stands in the same situation as every other man possessing the legal character of legitimacy. He proves that he is born of this lady, and having proved this, the law takes him under its protection, and says, 'pater est quem nuptiæ demonstrant.' It refers to a plain and sensible maxim which is the cornerstone, the very foundation, on which rests the whole fabric of human society; and if you allow that to be once shaken, there is no saying what consequences may follow. It is said that this lady was not very correct in her manners: but does this take away the legal presumption? No, my Lords, the counsel for the defender had too much good sense ever to dream of such a thing, to suppose

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that a man claiming to be served heir to his ancestor, must before making out his legitimacy, stand trial for his mother's delinquencies; that until her character come out pure and immaculate, he is to be denied his service, or that under such circumstances, a proof should be allowed of her whole conduct and gallantries. In a licentious age the consequences would be monstrous! But then does this presumption, which is of so much importance, yield to nothing? Is there no way in which it can be got the better of? These questions, Lord Stair, that oracle of the law of Scotland, has long ago answered. He tells you that the presumption holds in every case, unless you can prove the impossibility of connection. He rather seems to ridicule the idea that prevails on the other side of the Tweed, that there must be a separation between the parties; that the sea must be between them. He says that the law of Scotland does not require this: it only requires proof of the impossibility, whether by distance or otherwise, of the party being the father of the child. He states it as sufficient to take off the legal presumption, if during the time when the child must necessarily have been conceived, there was an impossibility of the father having begotten it. This does not depend upon the distance merely: for suppose the father and mother were confined in separate prisons for a twelvemonth, where it is utterly impossible for them to have access to each other; in this, and such other cases, the presumption must no doubt give way to the fact, wherever a kind of impossibility of intercourse between the parties is proved. Let us see how this turns out, because we have here an absence of the husband alleged, which it is said made it impossible for him to be the father."

The defendant appealed to the House of Lords, and the cause having been heard before their Lordships, the Lord Chancellor (Lord Eldon), on the 29th of June

1816, delivered his judgment, in which he declared that he concurred with all the Judges below, that in point of law the child must be taken to be the legitimate daughter of Francis Carruthers."

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In this case, though acts of adultery on the part of the wife were frequent and notorious, and though the question of actual paternity was extremely doubtful, it being a point of uncertainty, whether the husband had access at the time when the conception took place, yet as the mother was married, and there was neither corporeal infirmity, nor impossibility from distance of places, of the husband being the father, the presumption of law that " pater est quem nuptiæ demonstrant" was allowed to prevail;—that " legal, plain and sensible maxim" which, as Lord President Blair happily described it, " is the corner-stone on which rests the whole fabric of human society, which, if once allowed to be shaken, there is no saying what consequences may follow, and which is the foundation of every man's status, for his birth is a fact that may be proved by witnesses, but the conception is a fact which never can be proved"[1]. His Lordship justly repudiated the idea, that a man's birthright is to depend upon the imputed incontinency of his mother, if, at the time when she admitted other men to her embraces, her husband cohabited with her; and he appears to have contemplated with horror, the indecencies of which courts of justice would become the scene, if it were permitted to inquire into the actual paternity of a child when the husband was in the habit of having intercourse with its mother; if legitimacy were to become a question of physical examination, and it were to depend

[1] Lord Blair's language on this subject is very similar to the remark of Serjeant Rolfe, in the year 1422, who denied that it could be tried by an issue " by whom " the widow was with child, for he said that fact was known to God alone.—*Y. B.* 1. VI. 3. *Vide* p. 51, antea.

upon a comparison of corporeal powers, whether it was most probable that the husband or the paramour was the actual author of the child's existence.

Case of The King *v.* Luffe, 1807.

No other case illustrative of the law of legitimacy occurred until the well known case of *The King* against *Luffe*, which was tried in January, 47 Geo. III. 1807. An order of bastardy, which was removed into the Court of King's Bench by *certiorari*, was made by two justices of peace, under the following circumstances: Mary Taylor, the wife of Jonathan Taylor, mariner, was delivered of a male child on the 13th of July 1806; and it appeared, as well by the oath of the mother as otherwise, that her husband had been beyond the seas, and that she did not see him, or have access to him, from the 9th of April 1804 until the 29th of June 1806. The putative father appeared before the justices, but he did not show any cause why he should not be adjudged the father of the said child. The material fact of the case was, therefore, simply this:—The husband was separated from his wife at the time when the child was begotten, and during the whole period of gestation, except the fifteen days immediately preceding the birth of the child. Three objections were taken to this order; but as only two of them bear upon the law of legitimacy, no notice will be taken of any part of the argument which does not relate to it. The first of these two objections was, that the wife was admitted to prove the non-access of her husband; and the other, that the non-access of the husband was not proved during the whole time of the wife's pregnancy, which was said to be necessary to bastardize the issue. It was contended by the counsel in support of the order, that the non-access of the husband did not rest upon the evidence of the wife alone. The cases of *Pendrell* and *Pendrell*[1], and *Rex* v. *Bedale*[2], were cited

[1] *Vide* p. 127, antea.

[2] *Vide* p. 134, antea.

Case of The King v. Luffe, 1807.

to show that non-access may be proved to bastardize the issue, though the husband be in England, and that the old doctrine of the "quatuor maria" was agreed to be exploded; that non-access was proved until about a fortnight before the birth, which rendered it impossible, in the course of nature, that he could have been the father; that the cases of *Regina* v. *Murray*[1], and *Rex* v. *Albertson*[2], had been cited to show that non-access must be proved during the whole time of pregnancy in order to bastardize the issue; but those cases were decided upon the grounds of the old rule of the "quatuor maria," now exploded by the subsequent cases of *St. Andrew* v. *St. Bride*[3], *Pendrell* v. *Pendrell*[4], *Rex* v. *Lubbenham*[5], and *Goodright* v. *Saul*[6].

It was said, *contrà*,--As to the first objection, it had been clearly settled, since *The King* v. *Reading*[7], that the wife is not a competent witness to prove the non-access of the husband, and that in this case it expressly appears that the non-access was proved by her; that with respect to the third objection, the law presumes access, and the proof of non-access must come from the party disputing the legitimacy. The mode of proof was formerly very plain and precise; for unless the husband were proved to be beyond the four seas, or labouring under some personal disability, the children were deemed legitimate. "If," says Lord Coke, "the issue be born within a month or a day after marriage between parties of full lawful age, the child is legitimate." The law, therefore, never looked to the period of conception, or to the actual possibility of the husband having begotten the child, but only to the notorious fact of its birth during the marriage, and while the husband was within the four

[1] *Vide* p. 120, antea.
[2] *Vide* p. 117, antea.
[3] *Vide* p. 126, antea.
[4] *Vide* p 127, antea.
[5] *Vide* p. 142, antea.
[6] *Vide* p. 143, antea.
[7] *Vide* p 131, antea.

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seas. The doctrine, indeed, of the extra quatuor maria is now obsolete, and is supplied by the positive proof of non-access, though the husband be in England; but so much of the old rule of law still holds, that if access be proved at any time between the possible conception and the birth, the child is legitimate. So Mr. Justice Blackstone, speaking of the old doctrine, says, "If the husband be out of England (or as the law so, somewhat loosely, phrases it, extra quatuor maria) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. But generally (he adds, with reference to the later determinations engrafted on the old rule) during the coverture, access of the husband shall be presumed, unless the contrary can be shown; which is such a negative as can only be proved by showing him to be elsewhere."

Lord Ellenborough, Chief Justice:—"Suppose a husband who had been out of reach of access during the whole period of the wife's possible gestation, returned to his wife the very instant before her actual delivery, can it be pretended that the child would in such case be legitimate? The ground insisted upon in the case of *The Queen* v. *Murray* was a little slurred by Mr. Justice Lee, in *The King* v. *Reading*. If the fact be once ascertained that it is naturally impossible (I do not say improbable merely) that the husband should be the father of the child, the conclusion follows that the child is a bastard. There is a very early case, of *Foxcroft*, in the time of Edward the First[1], where an infirm, bedridden man was privately married to a woman who, within twelve weeks after, was delivered of a son; and the issue was adjudged a bastard. The principle to be deduced from the cases is, that if the

[1] It will be seen from the account of this case in the Appendix, that it does not apply to the point for which Lord Ellenborough cited it, as the illegitimacy of the child arose from the *invalidity of the marriage*.—*Vide* also p. 30, antea.

husband could not by possibility be the father, that is sufficient to repel the legal presumption of the child's legitimacy. But if the mere fact of access of the husband at any time between the moments of conception and delivery would make the child legitimate, it would have been an answer to many of the cases where legitimacy has been in question."

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Argument resumed.]—" No other certain time can be drawn than that laid down in *Regina* v. *Murray,* and *Rex* v. *Albertson.* In the latter case it is said, ' He is a bastard who is born of a man's wife while the husband at and from the time of the begetting to the birth is ' extra quatuor maria,' or as it is now understood, is proved to have had no access during that period. And in the report of the same case in Carthew, the third exception to the order, on which it was quashed, was that it was not alleged that the husband was beyond sea for forty weeks before the birth of the child, and that it would not be sufficient to say that he was beyond sea at the time of the conception : because that in nature could not certainly be known."

Lord Ellenborough said, " Here, however, in nature the fact may certainly be known that the husband who had no access till within a fortnight of his wife's delivery could not be the actual father of the child. Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to, and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon ; but where the question arises as it does here, and where it may certainly be known from the invariable course of nature, as in this case it may, that no birth could be occasioned and produced within those limits of time, we may venture to lay down this rule plainly and broadly, without any danger arising from the precedent."

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The Counsel then continued, " The same case, of *Rex* v. *Albertson,* is reported in 5 Modern, 419, and there Chief Justice Holt, is made to say that it must appear that the husband was not here all the space, for if he were here either at the begetting or at the birth of the child, it is sufficient. And this falls in with the established rule of law, which has never been questioned, that if a man marry a pregnant woman any time before the birth of the child, such child is legitimate. Then by analogy to that, if the husband have access any time before the birth of the child, the same construction must prevail."

Lord Ellenborough :—" Three exceptions have been taken to this order; first, that the wife was examined generally and alone to the fact of non-access, and that the order is founded on her evidence only, whereas it is laid down in the cases that an order of this sort cannot be made on the evidence of the wife alone, but that there must be other proof of the non-access. This objection is grounded upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter affecting his interest or character unless in cases of necessity, where from the nature of the thing no other witnesses can probably have been present; but exceptions of that sort have been established, and that it is necessary, and on that account allowable, to examine her as to the fact of her criminal intercourse with another, has been held by various Judges at different periods, for this is a fact which must probably be within her own knowledge and that of the adulterer only; and by a parity of reasoning, it should seem that if she be admitted as a witness of necessity to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove that the adulterer alone had that sort of intercourse with her by which a child might be produced within the limits of time which

nature allows for parturition. Certainly, however, it is competent for her to prove the fact of her connexion with that person whom she charges as being the real father of her child." Lord Ellenborough then adverted to the second objection, on the wording of the statutes of 18th Eliz. and 6th Geo. II. and afterwards proceeded to the third and principal exception: "that as it appears that the husband returned within access of the wife about a fortnight before the child was born, he must be presumed to be the father of it, which will throw upon him the burthen of its maintenance. As something has been said concerning the novelty of the doctrine of admitting the proof of non-access of the husband living within the kingdom in order to rebut the presumption of legitimacy, let us see how the law was understood to be in early periods. In 1 Rol. Abr. 358, tit. Bastard, letter B., it is said, 'By the law of the land no man can be a bastard who is born after marriage, unless for special matter.' Therefore in the very text of the rule an exception is introduced. The first special matter of exception mentioned by Rolle to bastardize the issue where the husband is within reach of access, is one of a natural impossibility; where the husband is within the age of puberty; though that was no obstacle to the marriage. There is a case in the Year Book, 1 H. 6, 3. b.[1], which goes the length of deciding the issue to be a bastard, where the husband was within the age of fourteen. There are several other cases mentioned from the Year Books, of course less questionable, as the age in those cases was much less. All these establish this principle, that where the husband in the course of nature could not have been the father of his wife's child, the child was by law a bastard. But *Foxcroft*'s case[2], p. 359 of the same book, which I before mentioned was the

[1] *Vide* p. 52, antea.

[2] *Vide* pp. 30. 166, antea, and Appendix, No. I.

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case of an infirm, bedridden man, who having married in that state twelve weeks before the delivery of his wife, that was holden to bastardize the issue, though the parties were together. And no doubt is thrown on the principle of that case in any subsequent authority, nor even in the learned Editor's Notes on Co. Lit. 244, a. 123, b. &c. This, therefore, is another instance of an exception to the general rule admitted at so early a period as the 10th Ed. I., and founded on natural impossibility arising from bodily infirmity. There is another case in the 18th Ed. I., also mentioned in Rol. Abr. (p. 356), still stronger to the present purpose, where the child was found to be born eleven days 'post ultimum tempus legitimum mulieribus pariendi constitutum;' and because of that fact, 'et quia per veredictum juratorem invenitur quod prædictus Robertus (the husband) non habuit accessum ad prædictam Beatricem per unum mensem ante mortem suam, per quod magis præsumitur contra prædictum Henricum' (the issue), &c.; therefore the brother and heir of Robert had judgment to recover in assize. Even at that time, therefore,[1] it was considered that the fact of access or non-access was a material question to be gone into; and that the period of time which had elapsed between the non-access and the birth, which only goes to establish the natural impossibility of the husband being the father of the child, was proper to be inquired of. And Lord Chief Justice Rolle adds a note to that case, that the Jury found that the husband languished of a fever long before his death; which shows that the natural impediment to any access, arising from his languishing of a fever some time before his death, was also considered as an ingredient in the question which was submitted to the Jury. The rule of law

[1] *Vide* remarks on that case, p. 32, antea. It is submitted that the distinction between a *posthumous child, and a child born during the coverture* of its mother, has not been sufficiently attended to in considering that case.

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which has prevailed in these cases is, "Stabitur huic præsumptioni donec probetur in contrarium; ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel aliâ causâ impeditus, vel erat in ea invalitudine ut generare non possit[1]." From all these authorities, I think this conclusion may be drawn, that circumstances which show a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded. And, therefore, if we may resort at all to such impediments, arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to show the absolute physical impossibility of the husband's being the father[2]; *I will not say the improbability of his being such; for upon the ground of improbability, however strong, I should not venture to proceed.* No person, however, can raise a question whether a fortnight's access of the husband before the birth of a full-grown child, can constitute, in the course of nature, the actual relation of father and child. But it is said, that if we break through the rule insisted upon, that the non-access of the husband must continue the whole period between the possible conception and delivery, we shall be driven to nice questions. That, however, is not so, for the general presumption will prevail, except a case of plain natural impossibility is shown; and to establish, as an exception, a case of such extreme

[1] *Bracton*, p. 6.—*Vide* p. 10, antea.

[2] The *physical impossibility* of the husband to beget a child, or, in other words, his impotency, was, as has been shown, always part of the "special matter" by which a child born in wedlock might be bastardized.

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impossibility as the present, cannot do any harm, or produce any uncertainty in the law on this subject. As to the case of *Regina* v. *Murray*, relied on for the position contended for, on which case alone *The King* v. *Albertson* proceeded, the ground of it was discountenanced by Mr. Justice Lee, in *The King* v. *Reading*. Without weakening, therefore, any established cases, or any legal presumption applicable to the subject, we may, without hesitation, say, that a child born under those circumstances is a bastard. With respect to the case where the parents have married so recently before the birth of the child, that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage of the parties is the criterion adopted by the law, in cases of anti-nuptial generation, for ascertaining the actual parentage of the child. For this purpose, it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage."

Mr. Justice Grose said:—" In respect to the third objection, as we have been warned not to break in upon the Common Law without some rule to go by, I shall make a few observations upon it. It is said that if we break in upon the old rule of the 'quatuor maria,' we must adopt some other line which will be difficult to be drawn. But that rule has been long exploded on account of its absolute nonsense, and we will adopt another line which has been marked out on account of its good sense. In every case we will take care, before we bastardize the issue of a married woman, that it shall be proved that there was no such access as could enable the husband to be the father of the child. If by reason of imbecility, or on any personal account, or from absence from the place where the wife was, the husband could not be the father of the child, there is

no reason why it should not be so declared. Here it is apparent that the husband, who had no access to the wife till two weeks before her delivery, could not be the father; and in saying so, we go upon the sure ground of natural impossibility and good sense, rejecting a rule founded in nonsense."

Mr. Justice Lawrence:—"The third question is, whether, as the husband had no access until about a fortnight before the birth, a child so born can be said by our law to be legitimate. Now, without going over the whole ground of the argument again, the doctrine of the 'quatuor maria' has been long exploded; and it has been shown by the authorities mentioned by my Lord, that imbecility from age, and natural infirmity from other causes, have always been deemed sufficient to bastardize the issue; all which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility? It is said, however, that in so doing we shall shake a settled rule of law, that if a child be born in wedlock, though but a week after the marriage of its parents, such child is to be deemed legitimate. But I do not see that the consequence supposed would follow. By the Civil Law, if the parents married any time before [after] the birth of the child, it was legitimate; and our law so far adopts the same rule, that if a man marry a woman who is with child, it raises a presumption that it is his own. Lord Rolle gives some such reason for the rule; and it seems to be founded in good sense, for where a man marries a woman whom he knows to be in this situation, he may be considered as acknowledging by a most solemn act that the child is his."

Mr. Justice Le Blanc:—"As to the third objection, the question will be, whether the child of a woman whose

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husband is proved to have had no access to her till a fortnight before her delivery, can in law be considered as illegitimate. And our attention has been called to cases where a child born within a short time after the marriage of the parents, is, by the rule of law, considered to be legitimate. That is a rule of law not to be broken in upon, except as in other cases, one of which has been mentioned, by proof of natural imbecility, which showed that the husband could not have been the father of the child; but in order to make the cases the same, it must be supposed that the adultery of the wife in the absence of her husband, who only returns to her just before her delivery, is assimilated in law to the case of a man's marriage with a pregnant woman recently before the birth of the child, where the very act of marriage in such a situation is an acknowledgment by him that he is the father of the child with which the woman is pregnant. But there is no analogy between the two cases. It comes then to a case of non-access for a year and a half, excepting the last fourteen days before delivery. The rule of law was formerly very strict in favour of the legitimacy of children born of a married woman whose husband was within the four seas, but that has been long broken in upon. Afterwards the rule was brought to this, that where there was an impossibility that the husband could have had access to his wife, and have been the father of the child, there it should be deemed illegitimate. And in *Goodright* v. *Saul* the Court held, that there was no necessity to prove the impossibility of access, if the other circumstances of the case were strongly to rebut the presumption of access. The cases of *The Queen* v. *Murray* and *The King* v. *Albertson* were rather cited for the sake of expressions thrown out by some of the Judges in giving their opinions than for the determination of the Court; for the points in judgment did not require the support of the doctrine

advanced, that there must be non-access during the whole period of the wife's pregnancy, in order to bastardize the issue. But where it can be demonstrated to be absolutely impossible in the course of nature that the husband could be the father of the child, it does not break in upon the reason of the current of authorities to say that the issue is illegitimate. If it do not appear but what he might have been the father, the presumption of law still holds in favour of the legitimacy. But if, as in this case, it be proved to be impossible that he should have been the father, then within the principle of the modern cases, there is nothing to prevent us from coming to that conclusion."—The order of sessions was confirmed [1].

Case of The King v. Luffe, 1807.

Notwithstanding that the *King* v. *Luffe* has been repeatedly cited as a leading authority for admitting evidence to bastardize children born during coverture, against the rule of the "quatuor maria," an attentive perusal of the report of that case must produce conviction that the old rule was very slightly, if at all, shaken on that occasion, and that the Court acted in the strict spirit of the ancient law. The notes which have been added to the observations of Lord Ellenborough, will tend to prove that the opinions of the Judges were consistent with the early authorities; and it is therefore only necessary to show the resemblance which the dicta of the Court, on the main points, bore to the old law.

The real question was simply this, whether the child of a married woman, whose husband was beyond the seas for more than two years before its birth, and who had no access to his wife until fifteen days before her delivery, was to be considered the child of the husband?

The only point raised, on which the decision differed

[1] 8 *East*, 193—212.

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from the doctrine of the "quatuor maria," consisted, therefore, in the old rule being supposed to render the absence of the husband indispensable from the moment of the conception until that of the birth; whilst it was contended, that his absence was not necessary during the *whole period* of gestation, but so long only as to render it physically impossible for him to be the father of the child; and that if non-access was proved until fifteen days before the birth, it was impossible for him to have begotten the infant. To adjudge that he was the father, under such circumstances, would have been to give to the law a construction repugnant to common sense. All that the ancient law required, was proof of the *impossibility* of the husband's being the father. It sternly rejected *probabilities*, and may have gone too far in its anxiety to prevent that which ought to be matter of *fact*, from being rendered mere matter of *opinion*; but it was as impossible for a man, who was absent from his wife for two years, to be the father of a child, born within fifteen days after his return to her, as if he had remained away until the instant before, or the instant after, her delivery. The decision in the *King* v. *Luffe*, is not at variance with Lord Coke's definition of the Law of Adulterine Bastardy, because he no where insists upon the absence of the husband during the whole period of gestation: nor is there any case in which it had been so decided; for the cases in which it had been held that the issue of a woman, by whomsoever begotten, born within even the shortest period after marriage, must be considered to belong to the husband, are not, as Lord Ellenborough and the other Judges observed, analogous to that case. The Court proceeded solely upon the *physical impossibility* of the husband's being the father; and all which Lord Ellenborough contended was, that it was competent for the Court to resort to "causes which showed the absolute *physical impossibility* of the husband's being the father.

I will not," his Lordship added, "say the *improbability* of his being such, for upon the ground of *improbability, however strong, I should not venture to proceed.* The general presumption will prevail, except a case of *plain natural impossibility* is shown; and to establish, as an exception, a case of such extreme *impossibility* as the present, cannot do any harm, or produce any uncertainty in the law on the subject." "In every case," said Mr. Justice Grose, "we will take care, before we bastardize the issue of a married woman, that it shall be *proved that there shall be no such access* as could enable the husband to be the father of the child;" and Mr. Justice Le Blanc, after noticing the alteration in the old law, observed, "afterwards the rule was brought to this, that where there was an *impossibility that the husband could have had access to his wife,* and have been the father of the child, that it should be deemed illegitimate." The case of the *King* v. *Luffe,* therefore, made no innovation in the spirit, and but little, if any, in the letter, of the law of legitimacy, as it is laid down by Lord Coke; whilst it confirmed the old principle, that the issue of a married woman must be considered the child of the husband, except upon *positive* and *conclusive evidence,* that, according to the law of nature, whether arising from impotency, or absence, it could not, *by any possibility,* have been begotten by him. In no previous case did a Court of Justice more unequivocally repudiate all reasoning or inferences founded upon *probability,* or more strenuously insist upon the necessity of evidence, based only on *physical* and *demonstrative facts,* of the *total impossibility of access,* on the part of the husband, at the time when he might have been the father, before a child, born during the coverture of its mother, could be bastardized.

Case of The King v. Luffe, 1807.

In the same year as that in which the case of the

Case of Boughton *v.* Boughton, 1807.

King and *Luffe* occurred, Lord Ellenborough tried the cause of *Boughton* v. *Boughton*, when the presumption in favour of the legitimacy of a child born of a married woman prevailed against the strongest *probability* that it was begotten by an adulterer. The facts were thus described by Lord Erskine, in his speech on the Banbury claim[1]. "In the year 1774, Salome Kay, the wife of a person in very humble life, left her husband, and became the mistress of Sir Edward Boughton. From that time she continued to live under the protection, and wholly at the expense of Sir Edward, and she ceased to hold any intercourse with her husband or to bear his name, having resumed that of Davis, which was her maiden name. In March 1778, she was delivered of a girl, who was baptized and registered by the name of "Eliza, daughter of William and Salome Davis." (William Davis, the brother of the mother, being a servant of Sir Edward Boughton.) Sir Edward brought up and educated Eliza Davis as his child; and by his will, dated on the 26th of January 1794, he devised considerable estates to her, by the description of his "daughter Eliza," for her life, and after her decease to the heirs of her body in tail general, provided that she married with the consent of her guardians, and that her husband should take the name of Boughton. After the death of Sir Edward, in 1798, Miss Davis, being still an infant, presented a petition to the Chancellor, stating that she was about to intermarry with Colonel Braithwayte, and as her guardians were not competent to consent to her marriage, she being an illegitimate

[1] *Report of the Gardner Case*, pp. 469, 470. Mr. Le Marchant observes that "this case was tried at the Middlesex Sittings, K. B. 1807. Lord Erskine stated the case from a report of it in the Morning Post (now before me). I have corrected his Lordship's statement by comparing it with the papers in the cause, which a professional friend had the kindness to procure for me. *Vide* also *Boughton* v. *Sandilands*, 3 *Taunt.* 342, where the facts of the case are noticed."

child, she prayed that Ann R. and Richard S. might be appointed her guardians, to enable them to consent to her marriage. The Chancellor, by an order dated on the 9th of August 1798, granted the prayer of the petition; the guardians were appointed, and the marriage was solemnized by licence. Doubts were afterwards raised on the legality of the marriage, upon the ground that Miss Davis could not be considered an illegitimate child, Mr. Kay, the husband of her mother, having been alive at her birth, and therefore her legal father, and the only person qualified to consent to her marriage. The Court of Chancery directed an issue to ascertain whether the marriage was legal, and the Court of King's Bench decided that it was not. The only question in the cause was the illegitimacy of Miss Davis, and stronger circumstantial evidence of that fact could not perhaps be brought forward in a case of this description. The separation of the husband and wife, the intercourse of the latter with Sir Edward Boughton, and the recognition of the child by that gentleman, were fully established. The baptismal register, the conduct of the mother, the reputation of the world, and the proceedings in Chancery, marked her as an illegitimate child. The single circumstance of the mother's husband being alive was all that could be urged to the contrary. The legal presumption in favour of legitimacy wrung a verdict from the jury, which no one can doubt they would gladly have withheld."

Case of Boughton *v.* Boughton, 1807.

On the same occasion Lord Erskine noticed a case which was then recently tried[1] at Welchpool, in which the legitimacy of a child named Lloyd was in question. The husband was a lunatic; and the wife lived in adultery with a Mr. Price, who was proved to have slept

Case of Lloyd, 1806.

[1] *Report of the Gardner Case,* pp. 468, 169. Mr. Le Marchant says, he had not been able to procure any particulars of this case.

Case of Lloyd, 1896.

with her at the time when the issue was supposed to have been begotten. The counsel dwelt strongly on the state of the husband's health, and the adulterous intercourse of the wife. But there was no proof of non-access; and it was imperative on the jury to find for the legitimacy.

Case of The King *v.* Inhabitants of Maidstone, 1810.

The precedent which was established by the decision of the case of the *King* v. *Luffe*, was followed in that of the *King* v. *The Inhabitants of Maidstone*, in July 1810, when the Court of King's Bench unanimously agreed, that the child of Ann Langridge, a married woman, who was born on the 5th of May 1808, was a bastard, because the husband was absent from England with his regiment from April 1806, until the 4th of January 1808, (during the whole of which time the wife remained in this country); that is, until within seventeen weeks, and two days, of the birth of the child[1]. The same reasoning which governed the case of the *King* and *Luffe* applied almost as strongly to this case; it being as much a matter of *physical impossibility*, for a child to be the result of sexual intercourse which took place *one hundred and twenty-one*, as *fifteen days*, before its birth.

Opinion of the Judges in 1811.

A few years after the case of the *King* and *Luffe*, the Law of Adulterine Bastardy occupied the attention of the House of Lords for a considerable period, on the claim of the late General Knollys to the Earldom of Banbury. The proceedings on that claim will be afterwards fully stated, from which the opinions of Lord Eldon, Lord Ellenborough, Lord Redesdale and Lord Erskine on the subject may be ascertained; and the only part of the proceedings which requires insertion in this place, are the opinions delivered by the Judges on certain questions submitted to them by the House of Lords.

[1] 12 *East*, 550.

Opinion of the Judges in 1811.

The following questions were proposed to the Judges; and their answers have, it is said, " been referred to in every subsequent case, in which the access of the husband and wife has been the subject of discussion [1]."

On the 30th of April 1811, the Judges were asked,

" I. Whether the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption ?"

The Lord Chief Justice of the Court of Common Pleas, Sir James Mansfield, having conferred with his brethren, informed the Committee, on the 2nd of May, that they were unanimously of opinion:

" That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption;" and gave his reasons.

The Judges were then asked,

" II. Whether the fact of the birth of a child, from a woman united to a man by lawful wedlock, be always, or be not always, by the law of England, *primâ facie* evidence that such child is legitimate ; and whether, in every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question ; whether such *primâ facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence, that such access did

[1] *Le Marchant.* Report of the *Gardner Case*, p. 433.

Opinion of the Judges in 1811.

not take place between the husband and wife, as by the laws of nature is necessary, in order for the man to be in fact the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access, (as the case may be) may always be lawfully proved, and can only be lawfully proved, by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the laws of England, that a physical fact be proved?"

"III. Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access? Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?"

To these questions the Lord Chief Justice of the Common Pleas delivered their unanimous opinion.

"That the fact of the birth of a child from a woman united to a man by lawful wedlock, is generally by the law of England, *primâ facie* evidence that such child is legitimate. That in every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question. That such *primâ facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife, as by the laws of nature, is necessary in order for the man to be in fact the father of the child. That the physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary by the law of England, that a physical fact be proved."

Opinion of the Judges in 1811.

" That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them), no evidence can be received, except it tend to falsify the proof that such intercourse had taken place. That such proof must be regulated by the same principles as were applicable to the establishment of any other fact."

On the 30th of May, the following questions were put to the Judges:

" IV. Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by Law presumed to have taken place, after the marriage, between the husband and wife (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved by evidence sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse within the period, when according to the laws of nature he might be the father of such child?

" V. Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife by sentence of divorce) can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but such non-access can be legally left to a jury upon any trial in the courts of law to repel the presumption of the legitimacy of a child so circumstanced?"

Upon these questions, the Lord Chief Justice of the Common Pleas, on the 4th of July, delivered the unanimous opinion of the Judges as follows:

" That in every case where a child is born in law-

Opinion of the Judges in 1811.

ful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such a child.

" That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and the wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father to that child ? and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when by such intercourse the husband could, by the laws of nature, be the father of such child.

" The non-existence of sexual intercourse is generally expressed by the words ' non-access of the husband to the wife ;' and we understand those expressions, as applied to the present question, as meaning the same thing ; because in one sense of the word access, the husband may be said to have access to his wife, as being in the same place, or the same house ; and yet, under such cir-

cumstances, as, instead of proving, tends to disprove that any sexual intercourse took place between them."

Opinion of the Judges in 1811.

It is obvious, that the opinions of the Judges were founded upon decisions subsequent to the case of the *Queen* v. *Murray* in 1704, when the rule of the "quatuor maria" appears for the last time to have been considered Law; and though they held, that the legal presumption that the husband is the father of the child, might be rebutted by evidence that he had not sexual intercourse with its mother when it was begotten, still they laid it down, in the clearest and most positive terms, that no *other* evidence would be sufficient to bastardize a child born in wedlock. The Judges also considered, that if it could be proved that the husband might have had nuptial intercourse with his wife at a period when, according to the laws of nature, the child could be the fruit of such intercourse, the only admissible evidence to rebut the presumption of paternity must have for its object, to *contradict that proof*; that nuptial intercourse is always presumed to have taken place between the husband and wife where a child is born in lawful wedlock (the husband and wife not being separated by a divorce), until that presumption is encountered by evidence that *sexual intercourse did not take place* at any time, when, by such intercourse, the husband could be the father of the child; and that the presumption in favour of the legitimacy of a child born in wedlock (the husband and wife not being separated by divorce), can *only* be rebutted *by evidence* that *sexual intercourse did not take place* between them, at a time when the husband might have begotten the child; that in cases of disputed legitimacy, the jury were to decide whether the husband was the father, and that *no other evidence* could be received to the *contrary*, than *proof*

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that *no sexual intercourse took place between him and his wife*, at a time when, by the laws of nature, he could have been the father of the child.

Though widely different from the law in the year 1632, when the first Earl of Banbury died, and for more than a century afterwards, with respect to the nature, and extent of evidence which is admissible to prove that the husband is not the father of his wife's child, still the *principle* upon which these opinions were founded is precisely that of the old Law. Sexual intercourse between man and wife must be presumed, and *nothing, except evidence* that the husband *did not have such intercourse* at the period of conception, can illegitimize a child born in wedlock. If the husband could, from circumstances of time, place, and health, have had nuptial intercourse with his wife, and there be no evidence to prove that he did not have such intercourse, he must be considered the father of her child, even if she had committed adultery with one, two, or twenty other men. The Law fixes the paternity on the husband, who took upon himself that responsibility by his marriage; and if, from his want of care, or indifference, he continued to cohabit with an adulteress, the burthen and ignominy of providing for a spurious progeny, are only proper penalties for his carelessness or baseness.

Unless it was *impossible* for the husband to be the father of the infant, or, in the concise and forcible words of Lord Ellenborough, unless "the *absolute physical impossibility* of the husband's being the father" is established by evidence[1], the Law protects the interests of the child, by securing to it the rights of legitimacy. However strong the probability may be, that it was the issue of an adulterer, the law rejects all arguments

[1] *King* v. *Luffe*. *Vide* p. 171, antea.

which are not founded upon indisputable *facts*; and proceeds upon the possibility of its being engendered by the husband, to avoid committing the flagrant injustice of divesting an innocent person of the most valuable right of civilized society; or, as Britton expresses it, prevents the adultery of the mother from debarring the child from the inheritance.

Opinion of the Judges in 1811.

The case of *Norton* v. *Seaton*, falsely calling herself *Norton*, which occurred in the year 1819, ought not to be omitted in this work; for although the legitimacy of the children of a supposed adulterous connexion was not immediately at issue, their status was involved in the question; and some points of law were raised on that occasion which entitle the case to attention.

Case of Norton *v.* Seaton, 1819.

George Norton of Baston, in Lincolnshire, Esq., was tenant for life of certain lands in that county, with remainder, in the event of his dying without heirs of his body, to his sister. He was married by licence on the 18th of June 1812, to Sarah Seaton, a person in an inferior station of life to himself; and it does not appear that any provision was made for her by settlement, or otherwise. The parties lived together in apparent harmony from the time of their marriage up to the year 1819, when it was supposed that Mrs. Norton had formed a particular intimacy with a farmer in the neighbourhood, of the name of Rubbins; and facts were disclosed which rendered it highly probable that she had long had an adulterous connexion with him. The notoriety of the circumstance having reached the ears of Mr. Norton's sister, the person entitled in remainder, he was made acquainted with his wife's conduct, in May in that year. An inquiry soon afterwards took place, and it was found that Mrs. Norton was, for the first time, in an advanced stage of pregnancy. Her husband was then in his fifty-second year, and she was about the age of thirty. By

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the advice of his friends, Mr. Norton removed his wife from his house on the 9th of June; and with the view of effecting a separation, commenced an action against Rubbins in the Common Pleas, but which he was afterwards advised to discontinue for causes which will be stated.

It was very generally believed that Mr. Norton had from his birth been totally defective in the necessary organs of generation, and that he was, and had always been, completely impotent. Evidence of a very curious character was obtained, which could leave no doubt of the fact. A physician of considerable eminence of Stamford, and a surgeon who lived in the vicinity, signed a certificate that having some years before been in attendance upon Mr. Norton, it was found necessary to extract his urine with an instrument, and that from the exposure requisite for the operation, they discovered that he must have been impotent from his birth; that he had a very diminutive penis; that there was no appearance of testicles; that there was no hair upon the pubis; and that these signs of his want of the powers of generation were further strengthened by his being totally without a beard. His personal defects were also described by a servant who had been in the habit of sleeping with him "because he was afraid to sleep by himself," at which time Mr. Norton was thirty years old; by a man who had washed him, when he accidentally fell into a drain, and by others who had frequently seen him in a state of nudity, who deposed that he was "but a poor weak creature in his body;" that "he was the most extraordinary made man in his whole frame" they ever saw, and not much better in his mind; that before he was married he appeared never to have any desire for women, but always seemed to have a dread of them, and was never cheerful in their company. It was also stated that Mr. Norton's father

was overheard, when disputing with his daughter about the disposition of his property, to say that his son "was not like other men, and could have no heirs."

Under these circumstances, and by the advice of counsel, a suit was instituted by Mr. Norton in the Ecclesiastical Court, to annul his marriage on the grounds of his *own* impotency; but which failed, on the principle that no man can take advantage of his own wrong, to relieve himself from his contract.

The case has been thus fully reported by Dr. Phillimore:

"Arches Court of Canterbury. By letters of request from the Consistory Court of Peterborough, Michaelmas term, December 4, 1819.

This was a suit of nullity of marriage, instituted by George Norton, by reason of his own natural impotency and defect in his organs of generation. The marriage had been solemnized by licence on the 18th of June 1812, he being then forty-five and the woman twenty-three years of age. They had cohabited till June of the present year.

Drs. Adams and Dodson, in objection to the libel:—This is a novel suit, and one which cannot be entertained. A man, after seven years' cohabitation, sues for a nullity of marriage on the ground of a defect in himself which always existed; he is desirous that his wife, having lost all opportunity of settlement, and he having taken all opportunities of fortune accruing to her, should now be dismissed from her marriage. We find no express law that a man may or may not complain on this ground, probably because no one could contemplate such a case. A woman may complain of the impotency of her husband; and the Canon Law would hold such a marriage not merely voidable but void. X. 2. 27. 2. 29; Brower, 2. 4. 14. 16. 2. 4. 22; Sanchez, 7. 97,

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9, 10, 12. 7. 98; but in X.[1] 4. 15, 4, we find that a person is not entitled to a divorce who knowingly contracts marriage with an impotent person;—*a fortiori*, therefore, a person who knows of his own impotency cannot make it the foundation for a suit of nullity of marriage. We submit that the husband is not entitled to bring such a suit; and that if the point be only doubtful, the Court should not hesitate to dismiss the cause.

Drs. Phillimore and Lushington, in support of the libel:—No doctrine of the Canon Law is clearer than that a man may sue for a nullity of marriage by reason of his own impotency. The Text Law[2], deduced originally from the Civil Law, is unequivocal[3]. X. 4. 15. 1; X. 2. 19. 4. All the commentators have interpreted it in the same manner. Panormitan[4], whom Hostienses and all the others follow, is so explicit as not to be mistaken. Ayliffe[5] makes it clear that we have imported this doctrine into the Canon Law as administered in this

[1] "Consultationi tuæ qua nos consuluisti, utrùm fœminæ clausæ impotentes commisceri maribus, matrimonium possint contrahere, et si contraxerint an debeat rescindi? Taliter respondemus, quòd licet incredibile videatur, quòd aliquis cum talibus contrahat matrimonium: Romana tamen ecclesia consuevit in consimilibus judicare ut quas tanquam uxores habere non possunt habeant ut sorores."

[2] "Cod. 5. Nov. 22. 6."

[3] "Accepisti mulierem, et per aliquot tempus habuisti, per mensem, aut per tres, aut per annum: et nunc primum dixisti te esse frigidæ naturæ, ita ut non potuisses convenire cum illâ, nec cum aliquâ aliâ. Si illa quæ uxor tua esse debuit eadem affirmat quæ tu dicis, et probari potest per verum judicium ita esse ut dicitis, separari potestis: eâ tamen ratione, ut si tu post aliam acceperis, reus perjurii dediceris, et iterum post peractam pœnitentiam priori connubio reparare debebis."

[4] "*Nota.*—Maritus potest reclamare et petere separationem *etiam impedimento proveniente ex se*; interest enim sua ut separentur; si non est inter eos verum matrimonium ut non teneantur ad onera matrimonii.—*Abb.* super quarto. *Accepisti, &c.* 1."

[5] "The husband may pray a separation of matrimony on account of a matrimonial impediment, though such impediment proceeds and arises from himself; as from his own impotency and frigidity."—*Parergon*, 230.

country; and a MS. opinion of the late Sir William Wynne[1] shows his understanding of our practice to be the same. The ground of the nullity is, that the marriage being void, there can have been no contract; all the reasoning, therefore, deduced from the authority of other contracts, must fail. Put the case of a man naturally impotent intermarrying with a woman, and that woman becoming pregnant by another man; what remedy has he, or, which is of more importance, what remedy have those who have a reversionary interest in his property, but a suit of this description? By what other course of proceeding can his estates be prevented from being transferred to foreigners? This is the only remedy pointed out by the law of the land; the suit is to be entertained for the purpose of ascertaining whether there has been *verum matrimonium*, and to ascertain the relative *status* and condition of the parties to each other. It is very true that the books lay down that a man[2] is not entitled to a divorce who knowingly contracts marriage with an impotent person; but the very same books lay down that he may allege his own impotency as a ground of divorce.

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Per Curiam:—I shall examine the authorities before I give my judgment, to see what was the doctrine of the Canon Law, and how far it has been adopted here; and in the meantime I wish search to be made whether there has been any precedent for such a suit. If the defect is

[1] "I think a woman may institute a suit of nullity of marriage against her husband on account of impotency or incapacity *in herself* to perform the duties of marriage, and I think that if the persons appointed by the Court to inspect her (which is the method of proof upon which these cases always proceed) should certify that she appeared to them, from a defect in the natural formation of her body, to be absolutely incapable of being carnally known by a man, upon this proof the marriage must be pronounced null and void.

"Doctors' Commons, May 5, 1777." "William Wynne."

[2] "But if he knowingly marries a woman that cannot render him his due, he is (notwithstanding) bound to maintain her; and shall not be divorced from her, for he ought to impute it to himself."—*Parergon*. 230.

Case of Norton *v.* Seaton, 1819.

such as has been pleaded, it seems as if the marriage must have been contracted *scienter*; then after so long a cohabitation, the party comes to annul his own contract. I wish precedents to be produced, if there be any.

Ibid. 1820.

The case again came on in January 1820, when Dr. Phillimore stated the difficulties that had attended the search, from the want of Reported Cases, and the inaccurate manner in which the Arches' Books had been kept. The search had been made with a twofold purpose: first, to ascertain the greatest number of years that had elapsed between a marriage and the institution of a suit of this description; and secondly, whether any instance could be adduced of a person instituting a suit on the allegation of his or her own impotency. The cases found were the following:

The Hon. *Catherine Elizabeth Weld*[1], alias *Aston*, against *Edward Weld*, of Lulworth Castle, in Dorsetshire; a cause of nullity of marriage by reason of impotence, in the Arches primâ instantiâ, by letters of request from the Chancellor of Bristol[2]. The parties were mar-

[1] "A daughter of Lord Aston's."

[2] "This cause was appealed to the Delegates. The first entry of it in the Court, or (as it is technically termed) the Assignation-book of the Delegates, on April 27, 1732, is as follows:—Archibaldus, Comes Ilay; Josephus, permissione divinâ Roffensis Episcopus; Thomas, eâdem permissione Bangorensis Episcopus; Thomas, eâdem permissione Asaphensis Episcopus; Johannes, Dominus Delawarr; Thomas, Dominus Foley; Jacobus Reynolds, Armiger, Cap. Baro. Scaccarii S. D. N. R.; Alexander Denton, Armiger, unus Jurisconsultorum, S. D. N. R. de Banco; Johannes Comyns, Miles, unus Baronum Scaccarii S. D. N. R.; Dominus Henricus Penrice, Miles; Matt. Tindall; Robertus Wood; Carolus Pinfold; Edwardus Kinaston, LL. D. Honorabilis Fœmina Catherina Eliza Weld, alias Aston, uxor pretensa Edwardi Weld de Lullworth Castle, in comitatu Dorsetiæ, Armigeri, contra eandem Edwardum Weld. Greenly exhibuit commissionem appendentem sub magno sigillo Magnæ Brittaniæ. Domini acceptarunt onus executionis ejusdem ad petitionem dicti Greenly exhibentis procurium pro parte appellante—decreverunt citationem tertio, &c.—et monitionem pro processu transmittendo in primam sessionem

ried in 1727; the suit was brought in 1730.—*The Duchess* v. *The Duke of Beaufort*, Arches, 1742: the suit was originally brought in the Consistory Court of London, where the Judge ordered the fourth article of the libel to be reformed; it was appealed to the Arches, where the libel was admitted in its original form. The cause was finally heard in the Arches, May 1743, on the Duke's answers, and the inspection of physicians, and decided in favour of the Duke. The Duke was twenty-one years old at the marriage; the Duchess seventeen. The marriage took place in 1729.—*Leeds*, otherwise *Lamborn*, v. *Leeds*. The parties married in 1753: the suit was brought by the wife in the Consistory Court of London, in May 1758. The libel was admitted, and the report of the physicians and surgeons was made on the 25th of May 1759; but the proctor for Mrs. Leeds objected to that report as not being sufficiently full and clear, and prayed a further report. The Judge rejected the petition, and concluded the cause. It[1] was appealed

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proximi termini. Boycott exhibuit procurium speciale manu propriâ et sigillo Edwardi Weld, Armigeri, partis appellatæ (here follow two words not legible) Domini ad ejus petitionem assignarunt Greenly ad libellandum in proximum. On the 17th of February 1732, the following entry occurs in the Assignation-book, which appears to have been made under the direction of the Condelegates;—for the names of none but the civilians in the commission, *viz.* Sir Henry Penrice, Drs. Tindall, Wood, Pinfold, and Kinaston, are prefixed to the minute. '*Domini assignaverunt ad infirmandum in jure in diem proximum*, whether there must be a continual cohabitation *per spatium triennale*, without interruption; whether, after three years' cohabitation, and the woman found a virgin,—whether the marriage shall not be declared null and void; whether a man that has been married three years, and at the end of that time is viewed by surgeons, and reported by them to be fully capable of propagation; whether such marriage can be dissolved;—notice to be given to the Lords Spiritual and Temporal.' The case was argued on the 21st and 23rd, and sentence was given on the 24th of May 1733, in favour of Mr. Weld, when the cause was remitted to the Inferior Court. The Judges Delegates present at the hearing and the sentence were the Bishops of Rochester and St. Asaph, Lord Delawarr, Chief Baron Reynolds, Baron Comyns, Sir H. Penrice, Judge of the Admiralty, Drs. Tindall, Pinfold and Kinaston."

[1] "The libel pleaded frigidity and impotency."

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to the Arches, where the appeal was pronounced for. The Judge ordered a more full report; and a further report was accordingly made; but that also was objected to on the behalf of Mrs. Leeds [1]. The cause was appealed to the Delegates. The Delegates pronounced against the appeal, but retained the cause; and it does not appear that any further proceedings were had in it.—*Forster*, otherwise *Schutz*, v. *Schutz*, Consistory of London, 1770. The marriage took place in March 1770. The suit was brought by the wife in November of the same year. The libel was admitted, some irrelevant articles being rejected. A report of physicians and surgeons was made. Objection was taken to that report: the Judge pronounced it to be full. The cause was appealed to the Arches; but the appeal not being prosecuted, it was remitted to the Consistory, where Mrs. Schutz [2] was held to have failed in proof of her libel.—*Gumbaldeston*, otherwise *Anderson*, v. *Anderson*, Arches, 1778. The marriage was in 1775; and the suit was brought in 1777, in the Consistory Court, by the wife. The libel was rejected; the Judge, Dr. Bettesworth, laying great stress

[1] "December 14, 1759. In the principal cause, an allegation was brought on the part of Mrs. Leeds, to which answers were given, and witnesses were examined, and publication was decreed; but there was no final hearing in either Court on the merits of the cause. It was appealed to the Delegates (as it had been before to the Arches), on a grievance, in December 1760, and mention of it recurs at various intervals in the Court-book of the Delegates, till the 4th of December 1762, when the assignation was continued till a day in Hilary term 1763; but no entry of the cause appears afterwards. In the valuable catalogue of the processes in the registry of the High Court of Delegates, digested with great care and industry by Dr. Jesse Addams, the following note is placed opposite the entry of this cause: '*In prima Inst.*—Leeds (Hester), *alias* Lamborn, *against* Leeds, in a cause of divorce by reason of impotence, in the Consistory Court of London, appealed by the wife to the Arches, and subsequently to the Delegates, on a grievance, viz. on the Judges of those Courts respectively overruling her objection to the report of the physicians and surgeons appointed inspectors of the husband's parts of generation, as ambiguous, &c., and incapable of satisfying the Court with respect to his potence or impotence."

[2] "Feb. 17, 1772."

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on the time of bringing the suit, there not having been three months' cohabitation. It was appealed to the Arches; and it appears that in the argument the Counsel (Dr. Wynne) pressed upon the Court the caution which ought to be observed in admitting pleas of this description. The note of the sentence of the[1] Judge (Dr. Calvert) is to this effect:—"Impotency a good ground of nullity. Not much weight in argument as to unfavourable suit. Whether the case is such as the Court can redress. The virginity of woman very material. Libel properly drawn; but in this case the opinions of inspectors only must determine; and not sufficient for the Court, as in the words of the libel, they could only say it appeared soft and short, which does not always continue; therefore three years' cohabitation necessary."—*Gumbaldeston*, otherwise *Anderson*, v. *Anderson*; Consistory, 1777; Arches, 1778. Libel rejected for want of three years' residence; only about three months' cohabitation.—*Schultz* against *Schultz*. *Leeds* against *Leeds*. *Larkin* against *Frost*.—*Harris*, otherwise *Ball*, against *Ball*. The parties were married in 1781. The husband was thirty-four, the wife seventeen years old: the suit was brought by the wife in the Arches, 1788. The libel was rejected[2]; but upon an appeal this sentence was reversed, and the libel was admitted by the Delegates to proof. The wife, however, ultimately failed in the suit[3]. *Dick* v. *Dick*, Arches, May 24th, 1811.

[1] "This note is transcribed from an indorsement, in the handwriting of Dr. Harris, on the brief from which he argued the case of *Harris*, otherwise *Ball* v. *Ball*, *Deleg.* 1789."

[2] "By Dr. Calvert."

[3] "November 24, 1790. The Delegates, by their interlocutory decree, pronounced that Hannah Ball had *totally* failed in proof of her libel, and dismissed Thomas Bannister Ball from the suit. The Judges Delegates who were present at the sentence were Mr. Justice Gould, Mr. Justice Buller, Mr. Baron Hotham, Dr. Fisher and Dr. Lawrence. Mr. Erskine, Mr. Piggott, Dr. Harris and Dr. Nicholl were counsel for Mrs. Harris: Mr. Bearcroft, Sir William Scott and Dr. Battine, contrà."

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" *Greenstreet* falsely called *Comyns* v. *Comyns*. The marriage was in 1807, the suit in 1812. Sir William Scott, in giving judgment in that case, said, ' There is great disposition on the part of the husband to atone for the injury he has inflicted on this lady, being in utter ignorance of his constitutional defects.' The libel in that case was drawn precisely in the same form as this;— and why in that case was the man to be presumed to be ignorant of his natural defect, and not so in this? In the text of the Canon Law[1], X. lib. 4, tit. c. 9, a case is stated in which a woman applied for a divorce on account of the frigidity of her husband, after eight years' cohabitation, and obtained it. The result of this search is, that there are many instances of suits having been brought many years longer after the marriage than in the present instance; but none in which the party seeking redress had been the party labouring under the infirmity; at the same time, there have been undoubtedly many suits of which no traces can now be found. It is observable also that none of these suits have been promoted by the husband. And would any one pretend to argue, because no case could be found, in which the husband had commenced proceedings, that the husband could not bring the suit? It is impossible to read the passages in the Canon Law, on which this doctrine is founded, to signify anything else than that the impotent party might bring the suit. Every commentator on them has deduced the same conclusion. Sanchez was cited against it at the last hearing; but his authority was mistaken. It is directly in unison with that of the other commentators, p. 354; and the whole of his doctrine on this head was clearly summed up in the 114th Disputation, which had for its title " Utrum conjugi impotenti et viro frigido, aut mulieri arctæ integram sit contra matrimonium proclamare, an

[1] " Vol. II. p. 10."

potius id jus proclamandi soli competit potenti?" Reasons for allowing such a conduct were not personal to the parties, but had for their object important public interests, and were founded upon a principle introduced into our Law from the Canon Law, to ascertain whether, in the language of the Canonists, there had been verum matrimonium, or not, and what was the relative *status* of the parties towards each other."

Dr. Adams, *contrà*.—The cases cited do not affect the point. The interval of time between the marriage and the institution of the suit might not be immaterial in this case; but time alone could bear but little upon it. The chief object of the Court was to ascertain whether there had been any cases in which the husband had been permitted to institute a suit for the purpose of establishing his own impotency. All the cases cited made out the negative to this position. In *Greenstreet* v. *Comyns*, the Court threw out its belief that the man was ignorant of his situation; here, however, the man was forty-five years old at the time of his marriage, and his situation could not be unknown to himself."

The Court took further time to deliberate, and on the 27th of January 1820 Sir John Nicholl delivered the following judgment:

"This suit is brought by George Norton against Sarah, to declare his marriage void; the libel pleads that the marriage took place in June 1812; that the husband was a bachelor, aged forty-five years, and the wife a spinster, aged twenty-three; that they cohabited till June 1819; that they were both in health, but that the husband was incapable, from bodily defect, to consummate the marriage; that his defect was incurable by art, as would appear upon inspection by medical persons. The admission of the libel is opposed by the wife, who prays to be dismissed.

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"The question is, whether the Court can entertain this suit; whether the husband is entitled to his remedy; whether he states facts capable of proof; or, whether, if the facts should be proved, the marriage ought to be set aside. The first objection is, that the suit is of a novel kind. After the best and most diligent search no instance has been found of a party bringing a suit to set aside a marriage on account of his own incapacity; the party complaining has always been the injured party, and generally the suit has been brought by the wife; there has been but one suit in my recollection brought by the husband, *Wilson* v. *Wilson*[1]. The next circumstance is the age of the man. It is incredible that he should have lived forty-five years, and be ignorant of his bodily defect, which he alleges to be apparent upon inspection. I do not see how his ignorance could be proved; it is incapable of direct evidence. The presumption is in favour of the marriage; besides, there was a subsequent cohabitation of seven years before the suit was brought; at all events, he must have discovered it some time before he applied for his remedy. The maxim then applies, 'cur tamdiu tacuit?' The lapse of time may act as an absolute bar to the suit not brought by the party injured. In[2] *Ball* v. *Ball* it was so held by the Delegates: the modesty of the sex may account for forbearance on the part of the woman;—he has not only defrauded his wife into a marriage, whereby he acquires a right to her property, but has kept her during a long cohabitation subject to continual injury, and now is seeking to throw off the burthen of maintaining her; this increases the weight of presumption against him. Another circumstance not to be passed over is, that the marriage was by licence. It is so usual for the man to be the person to obtain the licence, that it is to

[1] Arches, 1795 [2] Deleg. 1790.

be presumed in this case that he did so by his own affidavit; and he swore he knew of no impediment to the marriage; ignorance of the fact is not only not to be presumed, but is almost incredible. Another objection is, that we cannot obtain collateral proof either by the answers of the wife, or by the inspection of her person; it has been stated by the husband's counsel that the wife is pregnant; he cannot, therefore, call upon her to confess that her marriage was not consummated, for she must then furnish evidence to criminate herself. Nor can she allege that she is *virgo intacta*, a species of proof sometimes resorted to. So that in point of proof the case must rest upon the inspection of the husband by medical men; and can any case be found where sentence has been given on the sole report of the inspectors? This species of proof, even as collateral, is always received with caution. I am not aware that it has ever been held sufficient alone; and if not in any former case, is it to be first taken in this case, where the wife is said to be pregnant? The Court is called upon not merely to pronounce against the marriage, but to bastardize the issue. Is there any case in which bastardy has been established on the frigidity of the husband; or by any proof but that of non-access? There has been a cohabitation of seven years; frequent endeavours to consummate; and the Court is called upon to say that the issue is not of that person 'quem nuptiæ demonstrat.'

"Under these preliminary observations on the circumstances of the case it would be necessary, in order to support this suit, that the law authorities should be clear beyond all possibility of doubt. It has been said, that the public has an interest that the real state of the parties should be ascertained, and that is true where the marriage is void under the Marriage Act; but this is a

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voidable marriage, and laid down to be so by Blackstone. Then here the state is ascertained. The marriage exists. The sole authority in support of this suit is the text quoted from the Canon Law; it is necessary to examine how far that law applies to this case, and how far it has been received in this country. X. 4. 15. 1. If a man alleges his frigidity, and wife alleges the same, and can prove the same, by seven compurgators, they may be separated. X. 4. 15. 4. If a man contract knowing the defect of the woman, he is not to come for a remedy. Many learned commentators have been referred to; but they leave the text much as it appeared at first. Sanchez, in his seventh book, has written a large commentary on Matrimonial Law; upwards of 400 pages 'de impedimentis.' In his last Disputation he considers it still a question, whether the impotent party may apply for the divorce; and he holds he may, under circumstances, but limits it by certain restrictions, 'quando illius ignarus fuit tempore matrimonii; aliter minime auditur.' But let us examine how the text and commentators apply to the present case. The text applies to frigidity, which may be unknown before trial; but here the bodily defect is stated to be apparent. In the next place, the wife must join in the statement 'eadem affirmans;' but here, she resists the suit. So far from joining in it, her pregnancy is proclaimed. But collateral proof is also required: it must be proved by seven compurgators; a mode of proof not used here, and which we cannot have instead of inspection and answers.

"By the Canon Law the marriage is not absolutely dissolved; the parties are separated; and if the Church is deceived, the former marriage is to be renewed; and if a second marriage is contracted, it becomes null and void. What a state to place the parties in! This is something in the Text Law which I cannot readily assent

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to belong to the law of this country. If the marriage was contracted *scienter*, the party knew of the defect, and he could not be heard. The assertion of the defect in himself raises the presumption that he contracted the marriage *scienter*, that he cohabited *scienter*, and defrauded the woman. If the Canon Law is to govern the case, the text referred to does not come up to the point; even if it did, something more would be to be shown, namely, that it has been received as the law in this country. It might not be necessary for this purpose to show a case precisely similar; it would be sufficient to show that it is according to the general rules observed here. But it is a strong, and almost a conclusive presumption, against the present proceeding, that no suit appears ever to have been brought by any but the injured party. Ayliffe[1] has been quoted: but he refers merely to the text of the Canon Law. Another authority has been cited from the opinion of Counsel: but that was on the case of a woman. The opinion of any person of higher authority cannot be produced than of that person[2], but it cannot be considered as an authority applying to this case. The Court does not mean to lay it down that in no possible case, or under no circumstances, a woman may not be allowed to bring such a suit. But even if the Canon Law is direct on the point, is it according to the law of England to receive such a suit? It is a maxim that no man shall take advantage of his own wrong: it is the principle of the Canon Law itself, the principle of reason and justice. There is no instance of a suit brought by a person alleging his own incapacity: there is so strong a presumption for the marriage that no sentence is ever pronounced against it, except on the fullest authority; and if a mistake is made, the marriage is not

[1] *Parergon*, p. 227.

[2] Sir William Wynne. *Vide* p. 191, note, antea.

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held dissolved, but to be renewed. This is a situation in which the law of England would not place the parties. On the whole, I am not satisfied that the party would be entitled to the sentence prayed. I reject the libel, and dismiss the suit[1]".

After the termination of the suit, Mr. Norton again received his wife under his roof, and continued to live with her until his death, which happened on the 15th of June 1823. The issue of Mrs. Norton are two sons; the eldest of which, who is still a minor, will, unless his illegitimacy be established, succeed to the entailed estates of the Norton family. Rubbins, the supposed paramour, again became Mr. Norton's guest; and continued his intimacy with Mrs. Norton, at that gentleman's house, until the death of her husband, who appointed him one of his executors, and a trustee for the children[2].

Case of Head *v.* Head, 1823.

The next time the subject was brought before the Courts, was in the case of *Head* v. *Head*, in 1823; it was then held, that where personal access between the husband and wife is established, sexual intercourse is to be presumed, which presumption must stand until it is rebutted by clear and satisfactory evidence to the contrary. The facts of that case, as they appeared at the trial, were briefly these:

William Head married one Elizabeth, on the 9th of November 1795: in June 1797 a separation took place, in consequence of disagreements, arising from the husband's habitual drunkenness; and in November of that year, the wife went to reside at the house of her uncle, Thomas Randall, who had a son, James Randall, living with him. William Head was in the habit of visiting his wife during

[1] *Phillimore's Reports*, vol. III. p. 147, *et seq.*

[2] For the facts of this case, the Author is indebted to Richard Lambert, Esq., of John-street, Bedford-row, who obligingly lent him the papers relating to it.

her residence at her uncle's house, and at the last interview between them, which occurred in July or August 1798, they were alone in a kitchen for some time. Elizabeth Head became pregnant, and left her uncle's house; and on the 7th of May 1799 she gave birth to the plaintiff, who was baptized by the name of "James, the son of William and Elizabeth Head." William Head died on the 30th of August 1800; and in 1806 his widow married James Randall, by whom she had afterwards a son, named Francis. It was proved that after that marriage the plaintiff was sent to school by the name of James *Randall*, and that he had subsequently used, and been known by that name; but there was no evidence of any familiarity having passed between James Randall and Elizabeth Head up to the time of her leaving the house of her uncle.

An issue was directed by the Vice-Chancellor to try whether James Head was legitimate; which was tried in the sittings after Michaelmas Term, 1822, before Mr. Justice Burrough, who laid down the law to the jury in the language of Lord Ellenborough in the case of *The King* v. *Luffe*, that where a child is born of a married woman, the husband is to be presumed to be the father, unless there be evidence to show the absolute *physical impossibility* of his having begotten it; and the jury therefore found for the legitimacy.

A motion for a new trial was made before Sir John Leach, the Vice-Chancellor, on the ground of a misdirection by the Judge; but it was ordered to stand over until an authentic copy of the opinions of the Judges in the *Banbury* case was obtained, as it seemed to the Court that they must govern its decision in the present case.

Mr. Sergeant Lens, and Mr. Bell, in support of the motion, admitted the rule to be, that there must be irresistible presumptive evidence of non-access, where the

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husband and wife were found in the same place at a time, when, if sexual intercourse had taken place, the husband might, in the course of nature, have been the father of the child. But they contended, that in this case the jury had given their verdict under the influence of the Judge's direction, that there must be a moral impossibility that the husband could be the father of the child. If the Judge had merely stated, that the case was one which required overwhelming evidence as to the presumption of non-access, there would have been no ground for complaint. All that was wanted was, that the case should go before a jury, unfettered by any direction or statement of the rule of law, which should make them think it indispensable, in order to establish the illegitimacy, that the actual impossibility of the husband being the father must be proved. Admitting that the evidence must be such as to raise an irresistible presumption that the husband was not the father, a jury had not yet had an opportunity of considering the case under that impression as to the rule of law.

The Vice-Chancellor:—" The ancient policy of the law of England remains unaltered. A child born of a married woman, is to be presumed the child of the husband, unless there is evidence which excludes all doubt, that the husband could not be the father. But, in modern times, *the rule of evidence* has varied. Formerly, it was considered, that all doubt could not be excluded, unless the husband were ' extra quatuor maria.' But, as it is obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a character to exclude all doubt: and when the Judges, in the *Banbury* case, spoke of satisfactory evidence upon this subject,

they must be understood to have meant such evidence as would be satisfactory, having regard to the special nature of the subject. It is to be deduced, as a corollary from the opinions of the learned Judges in that case, that, whenever a husband and wife are proved to have been together, at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was, *primâ facie,* to be presumed; and that it was incumbent upon those who disputed the legitimacy of the after-born child, to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place; and not, by mere evidence of circumstances, which might afford a balance of probabilities against the fact that sexual intercourse did take place. In the present case, the husband and wife are proved to have been together at a time, when, if sexual intercourse did take place between them, the husband might, in the order of nature, have been the father of the plaintiff; and the circumstances given in evidence on the part of the defendant, not only do not afford irresistible presumption that sexual intercourse did not actually take place, but leave the balance of probabilities in favour of the fact that sexual intercourse did take place between them. It is true that the rule laid down by the learned Judge who tried the issue, from the case of the *King* v. *Luffe,* cannot be reconciled with the opinions of all the Judges in the *Banbury* case, and is not, therefore, to be considered as the rule now applicable to the subject: yet, as it is my opinion that if, upon any direction from that learned Judge, the jury had found a different verdict, it would have been my duty to have ordered a new trial, it cannot serve either the purposes of justice, or the interest of the parties, to submit this

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case, a second time, to a jury, in order to give to the defendant the chance of their coming to a verdict, which if they did find it, I could not adopt." The motion was refused [1].

The motion was afterwards heard upon appeal before Lord Chancellor Eldon, on the 24th of April 1823, who said,

"If I rightly understand that case of *The King* v. *Luffe,* I take it directly to establish no more than this, that if a man be proved to have had sexual intercourse with his wife, yet still if it can be shown that it was impossible that the child of his wife should be his child, it is competent to a party, notwithstanding sexual intercourse between the husband and wife be proved, to establish by evidence the impossibility that such sexual intercourse could bring the child into existence. There is no denying that in what fell from the Judges in that case, there are very strong passages to show, that beyond that they did not mean to determine, how far the old rule of law, as to the husband's being within the four seas, was or was not to be affected. The case of the *Banbury Peerage* was decided in the House of Lords after very great consideration, and upon that occasion some questions were put to the Judges. Now it is well known, that the questions proposed to the Judges by the House of Lords, though made to approximate so nearly to the questions to be determined, as to enable the House to form a judgment on the case actually before it, cannot be the very questions which the House is called upon to decide. The answers given by the Judges therefore, although entitled to the greatest respect, as being their opinions communicated to the highest tribunal in the kingdom, are not to be considered

[1] 1 *Simons & Stuart,* 150.

as judicial decisions; but in that case of the *Banbury Peerage*, I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which they mean, as I understand them, sexual intercourse, has taken place between the husband and wife, the child must be taken to be the child of the married person, the husband, unless, on the contrary, it be proved, that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal access, as contradistinguished from sexual intercourse, and on that subject I understand them to have said, that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand, till it is repelled satisfactorily by evidence that there was not such sexual intercourse. What is satisfactory evidence that there was not such sexual intercourse is a question which may be put in two points of view; First, is it meant that it must be proved, from circumstances which took place at the time that that personal access, which might or might not give an opportunity of sexual intercourse, was had, or by the evidence of persons present, that sexual intercourse did not take place? Or, secondly, that you are to go into all the evidence as to the conduct of the parties prior to the interview in which personal access was had, and their conduct after that interview, in order to satisfy yourself, by the evidence of circumstances both previous and subsequent to the interview, what did or did not pass when that interview was had? Whenever it is necessary to decide that question, great care must be taken, regard being had to this, that the evidence is to be received

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under a law, which respects and protects legitimacy, and does not admit any alteration of the 'status et conditio' of any person, except upon the most clear and satisfactory evidence. It does not appear to me to be necessary now to ascertain what is the actual rule of law upon the subject. Upon my recollection of the *Banbury Peerage* case, it was the opinion of the Judges, that where personal access is established, sexual intercourse is to be presumed, and that that presumption must stand, till done away with by clear and satisfactory evidence, whether that evidence apply directly to the period at which personal access was proved, or whether it may be called satisfactory, if it apply not to that period, but to antecedent and subsequent periods, in one way or other the rule must be established."

Lord Eldon then observed upon the doctrine of Courts of Equity as to new trials, that if evidence which ought to have been received, has been refused, or evidence which ought to have been refused has been admitted, or if in some instances the Judge can be shown to have miscarried in his directions to the jury, the Court will not grant a new trial, if looking at the whole evidence before the jury, and the address of the Judge to the jury, its own conscience is satisfied; and concluded by remarking, that if the jury upon the evidence had found it a case of illegitimacy, he should have granted a new trial, and that it would be dangerous beyond measure for the Court to say, that such evidence as was given at the trial, was evidence to repel or break down the presumption of law. The motion for a new trial was accordingly refused[1].

Lord Eldon's remarks on that occasion are very important, in reference to the *Banbury* case, because they show the grounds upon which his Lordship considered

[1] 1 *Turner & Russell*, 139.

that claim to have been rejected; namely, that there was clear and satisfactory evidence to rebut the presumption of law that the husband had had sexual intercourse with his wife, at the time when he might have been the father of the children. Case of Head *v.* Head, 1823.

A case of Adulterine Bastardy of considerable importance was brought before the House of Lords in 1824, on the claim to the barony of Gardner, which is remarkable for the medical evidence produced respecting the period of gestation, and which has been ably reported by Mr. Le Marchant, who was one of the Counsel for the successful claimant. The Honourable Alan Hyde Gardner, afterwards the second Lord Gardner, a captain in the navy, married, in March 1796, Maria Elizabeth Adderley, and they cohabited together as man and wife, until January 1802, except during the occasional absence of the husband in the naval service. On the 30th of January 1802 Captain Gardner took leave of his wife on board ship, sailed a few days afterwards for the West Indies, and did not return to England until July in that year; and it was proved in evidence that he could not possibly have had access to his wife after the 30th of January[1]. For some time before he sailed, and during the whole time of his absence, his wife carried on an adulterous intercourse with a Mr. Henry Jadis. Upon Captain Gardner's return to England, on the 11th of July 1802, he found Mrs. Gardner apparently with child; and she, with the hope of being delivered within the proper time for the infant to be legitimate, avowed that she was pregnant. It appeared that she adopted various expedients to accelerate her delivery; but failing in her efforts, she then said she was mistaken about her situation, and that her size arose from dropsy. Her medical attendants seem Case of the Barony of Gardner, 1824.

[1] *Le Marchant*'s Report of the *Gardner Case*, p. 7.

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to have connived at this misrepresentation, which had the effect of deceiving Captain Gardner and his family. On the 8th of December 1802, Mrs. Gardner was privately delivered of a son, without the knowledge of her husband, which child was immediately conveyed to an obscure lodging, was afterwards baptized by the name of *Henry*, and was always treated by Mr. Jadis as his son. Mrs. Gardner's criminal conduct and delivery, were successfully concealed from Captain Gardner until June 1803, after which time he had no intercourse of any kind with her. In Easter Term 1804, he brought an action for criminal conversation against Mr. Jadis, and obtained a verdict for 1,000 *l.* damages. He also obtained a divorce from the Ecclesiastical Court; and his marriage was afterwards dissolved by Act of Parliament, which Act "enabled him, and saved to all persons, except her and the child born of her body, and baptized by the name of Henry Fenton Gardner, all such rights as they would have had if the Act had not passed.[1]" Captain Gardner succeeded to the barony of Gardner in 1808, married in April 1809 the honourable Charlotte Smith, and by her had a son, Alan Legge Gardner, who was born in January 1810. Lord Gardner died in December 1815, leaving the said Alan Legge Gardner heir to the barony, in the event of Henry Fenton Gardner, who attained his majority in December 1823, being illegitimate. A petition was presented to the King on behalf of the said Alan Legge Gardner early in 1824, praying His Majesty to order his name to be placed on the Parliament Roll as a minor Peer, or to take such other measures, as His

[1] Upon this clause of the Act, the Lord Chancellor (Eldon) observed, in answer to the Counsel for Mr. Alan Legge Gardner, that that exception "deprived the claimant, Mr. Fenton Gardner, of any right under the marriage;" that, "the Act was drawn contrary to the usual form; that the passage alluded to ought to have been struck out; and that, in his opinion, such a declaration as this in a private Act, to which Mr. Fenton Gardner was not a party, is not evidence against him."—*Le Marchant*, p. 276.

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Majesty might think proper, for declaring and recognising his right to the barony of Gardner. The petition was referred to Sir John Copley, the Attorney-general, who reported it to be his opinion that "by reason of the absence and separation of Lord Gardner from his first wife during the whole of the period from the 7th of February to the 11th of July 1802, whilst employed in His Majesty's service on a distant station, he could not be, and was not, the father of the child, born of the body of his said first wife on the 8th of December 1802; and consequently that the petitioner had established his right to the barony; but as he was informed by the solicitor of Mr. Henry Fenton Gardner that he intended hereafter to establish his claim, he suggested that the petitioner's claim should be referred to the House of Lords."

After a careful inquiry as to the period of gestation, during which the most eminent accoucheurs and midwives of the metropolis, and several married women were examined, the House of Lords resolved that "Alan Legge Gardner was the only son and heir male of the body of his father Alan Hyde Gardner Lord Gardner, and that he had made good his claim to the title, dignity and honour of Baron Gardner;" thus establishing the illegitimacy of Mr. Fenton Gardner, the other claimant.

So far as appears from the proceedings of the House of Lords, the fact of the legitimacy or illegitimacy of Mr. Fenton Gardner turned upon these two points: First, whether a child born three hundred and eleven days, or forty-four weeks and three days, after sexual intercourse, could have been begotten by such act of sexual intercourse[1]? Or, secondly, whether a child, born one hun-

[1] Namely, from the 30th of January to the 8th of December. The Counse for the present Lord Gardner also questioned the medical witnesses whether

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dred and forty-nine days, or twenty-one weeks and two days, after sexual intercourse, which was born alive, was perfect in all its members at its birth, and lived to manhood, could be the result of that intercourse? If the latter point were decided in the negative, the first question came strictly within the application of the maxim "of the four seas," after that rule was so far modified, as not to require the absence of the husband from the realm during the *whole* period from the conception of the child to the moment of its birth; because its legitimacy would then depend upon the fact, whether Captain Gardner was or was not "extra maria" at the time when it must have been begotten? The resolution of the House of Lords, by which the child was bastardized, was therefore conformable to the law as it stood before the rule of "the four seas" was entirely exploded, as well as to every subsequent dictum and decision of the Courts, more particularly to the case of the *King* v. *Luffe*, because the principle which governed the House of Lords was the *physical impossibility* that Lord Gardner could, according to the Law of Nature, have been the father of the child, he not having had access to his wife, in consequence of his absence "extra quatuor maria" at the time when the child was begotten [1]. The medical evidence is highly curious; for although many,

a child born on the 8th of December could be the fruit of sexual intercourse on the 7th of February, the day on which Captain Gardner left England?

[1] It may be proper to notice here, the case of *Foster* and *Cooke*, which occurred in August 1791, lest it be supposed that it was overlooked; but as it is universally considered a case of no importance, and one which ought not to have been reported, it has not been thought proper to introduce it into the text. It will be found in *Brown's Chancery Cases*, vol. III. p. 347, and was fully stated by Lord Eldon (who was one of the Counsel in it) during the claim to the Barony of Gardner, on which occasion his Lordship said, he held it to be a case of very small importance.—*Le Marchant*, p. 286. The facts were briefly these; An issue was directed to try, whether a child, born forty-three weeks after the husband's death was legitimate; and it said that the jury found this posthumous child to be the heir-at-law. The

and perhaps the majority of the eminent professional persons who were examined, were in favour of the generally received opinion as to the time of gestation, namely, that forty weeks formed the 'ultimum tempus pariendi;' instances were cited by others, among which, in two cases, were their own wives, where pregnancy had been protracted to ten calendar months, and even to three hundred and thirty-five days[1]. Nothing was said by the Lord Chancellor, or by either of the other law Lords, illustrative of the law of legitimacy generally; as they merely expressed their opinions that the son of the second marriage had established his claim, and consequently that the other claimant, Mr. Fenton Gardner, was not the son of Lord Gardner.

It is said in the article in the Edinburgh Review[2] before referred to, that the decision of the *Gardner* case "was founded upon the circumstances of concealment and adultery, and also upon the impossibility of his being the child of Lord Gardner, from the length of time (311 days) which elapsed between the last opportunity of access between his mother and her husband, and the period of his birth." And the writer thus proceeds:

"We have no hesitation in saying, that after the *Banbury* case, the concealment and other circumstances which attended the birth of this child, were ample grounds for declaring him illegitimate. And we are rather surprised that the House of Lords should have permitted so long a discussion upon the subject of protracted ges-

interests of the legatee were not affected, whichever way the verdict went; nor does it appear before what Judge the trial took place, nor whether a common or special jury was employed.

[1] *See* the evidence of Drs. Granville, Conquest and Power, and of Mr. Sabine. Some valuable remarks on this subject will be found in the *Law Magazine*, vol. IV. p. 48, where it is suggested that "in a matter of so much obscurity and doubt, an extension of three hundred and ten days should be allowed, and that a greater protraction only, should be considered proof of illegitimacy."

[2] No. 49, March 1829, pp. 209, 210.

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tation ; an inquiry which they appear to have encouraged for the gratification of their own curiosity upon an interesting question of physiology, rather than to assist them in determining the legitimacy of the claimant : for Lord Eldon, who was then Chancellor, in giving his judgment, says, 'It is not by any means his intention to do more than express his conviction that the petitioner has made out his claim—that there are a great many more questions which arise in a case of this nature ; almost the whole of which were considered in the *Banbury Peerage* ; but without entering into a detail of these questions, and *without entering into a discussion as to the ultimum tempus pariendi,* he is perfectly satisfied, upon the whole evidence, that the case has been made out.' It might no doubt be expedient, 'ex abundanti cautela,' to dwell upon the circumstance of protracted gestation ; but there was enough without it. The birth of the child was sedulously concealed from the husband. He was called by the name of the adulterer, who reared him, educated him, and finally provided for him ; having moreover, married Mrs. Gardner the instant the divorce was obtained. Surely if the *Banbury* case be law, there is enough here to bastardize the child without resorting to the obstetric evidence which forms so large a portion of this case. And after all, what does it amount to ? a number of the most eminent midwives in London are brought to the bar of the House of Lords, to swear that 40 weeks or 280 days, is the usual length of time a woman goes with child ; and speaking from their own experience, that this is the 'ultimum tempus pariendi mulieribus constitutum.' Now this is all very true in a general way ; and we are perfectly satisfied, with all the rest of the world, that nine months is the usual time of gestation. But can any medical man assert, that it is absolutely and invariably *limited* to nine months ? Upon what can they found such an opinion ? The moment of

conception can never be known to them, but from hearsay; and the whole thing is involved in the greatest possible uncertainty, because there is no way of fixing accurately the time from which the gestation is to be reckoned.

" A technical discussion of this subject would involve us too much in medical details; but if any of our readers have the curiosity to pursue it, we refer them to the evidence of the physicians, given at length in M. Le Marchant's book, particularly to the statements of Dr. Clarke, (a witness called to prove forty weeks the 'ultimum tempus') pp. 20–27; from which they will perceive, that there *may* be an error of a whole month in the calculation. If the only point in the *Gardner* case had been, that the claimant was not the son of Lord Gardner, because it was *impossible* his mother could have gone forty-three weeks with him, the House of Lords never would have declared him illegitimate. It was the adultery of his mother, and *the concealment of his birth from the husband,* which justified the House in holding that he could not have been the result of the intercourse which took place on board ship between Captain Gardner and his wife on the 30th of January preceding his birth; and when Lord Eldon said he should give his opinion, 'without entering into the question of the ultimum tempus,' it is perfectly clear he did so for the purpose of guarding against the decision being ever taken as a precedent, that a gestation protracted three weeks beyond the usual time, should be a ground for bastardizing the child."

The writer of the article from which the above extract is taken, considers that the *concealment* of the birth of the children of a married woman is, in all cases, a sufficient cause for declaring their illegitimacy; and this opinion may have inclined him to attribute the decision of the *Gardner* case partly, if not

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entirely, to that circumstance. But the speeches of Lord Eldon and the other law Lords afford no grounds for such a conclusion; and for aught that appears to the contrary, the claim of Mr. Fenton Gardner was rejected solely upon the *physical impossibility*, arising from time and place, that Captain Gardner could have been his father. Reasons will be afterwards stated for dissenting from the opinion, that concealment of the birth of children is a safe and proper criterion by which to judge, either of their actual, or legal paternity.

Case of Morris and Davis.

The last case connected with the subject is of that of *Morris* and *Davis*, which is one of considerable importance, and has attracted more of the public attention than perhaps any other, except the *Banbury Peerage*, in consequence of the number of times it has been tried, and the frequency with which it has been brought before the Court of Chancery. Nor is the question finally set at rest, as it is to be again raised in the House of Lords, on appeal from the judgment of Lord Chancellor Lyndhurst. Upon a case, which is still *sub judice*, it would be improper to make any comments; and the following statement will be confined to the facts as they have been related in an article on legitimacy in the Edinburgh Review[1], and to the judgments of Lord Lyndhurst in 1827 and 1830.

" [2] In the year 1778, Mr. Morris, a surgeon in Shrewsbury, married Miss Gwynne, and by their marriage settlement, his estates in Montgomeryshire were settled to the issue of the first and other sons of the marriage in tail, remainder to Mr. Morris. In July 1781, Mrs. Morris was delivered of a daughter, who subsequently became the wife of Mr. Davis, and a defendant in the

[1] No. 97, March 1829.

[2] The following statement of facts is said to have been taken from the short-hand writer's notes.

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cause. Some time afterwards, Mrs. Morris shewed such a decided predilection for a servant who lived in the family, of the name of William Austin, that Mr. Morris determined upon a separation; and accordingly, by an indenture, dated May 1788, he conveyed to a trustee certain estates upon trust for the separate maintenance of Mrs. Morris. Soon after this he gave up his profession, and retired to his estate at Argoed, where he lived in great seclusion until his death. Immediately upon the separation Mrs. Morris settled at Llanfair, where she lived in undisguised adultery with William Austin. In 1793 Mrs. Morris was delivered of a son, who was immediately carried by Austin to Wem, a village at which his father, a weaver in very low circumstances, lived. An entry of the child's baptism was made in the parish register of Wem: '11th January 1793, Evan Williams, *a base born child*, was baptized.' Austin's father and mother kept the child, and brought him up under the name of Austin, treating him as the child of their son, by whom the expenses of his nurture and education were borne.

"The interest of Mrs. Morris about this time obtained for Austin a commission, and soon after a company, in the 90th regiment of foot; and in 1804, he went with his regiment to the West Indies, having first presented Mrs. Morris with his portrait, which was proved to bear a striking resemblance to the child. He died at St. Vincent's in 1807, having, by his will, bequeathed the whole of his property to Evan Williams, who received the amount from his executors.

" In 1792 and 1793 Mr. Morris resided at Argoed, about fifteen miles from Llanfair. The birth of the child had been carefully *concealed* from him; and up to the period of his death he believed that he had no other child but his daughter, Mrs. Davis. Upon reports being circulated, that Mrs. Morris had been delivered of a son,

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he went over to Llanfair, and had an interview with her; and upon charging her with the fact, she positively denied it, adding, 'she wished the devil might take her off the earth, if she ever had any child but her daughter Harriet.' All the subsequent acts of Mr. Morris show that he was satisfied of the truth of this assertion. His daughter having married against his consent, he made a will, bequeathing all his property to his nephew; but being afterwards reconciled to Mrs. Davis, he made another will in favour of her and her children. In neither of these does he take any notice of a son. In 1807, three years before his death, he was party to an agreement under an Inclosure Act, and his daughter is therein styled, 'his only child and heir apparent.' This agreement related to property settled on his male issue, so that his daughter would have been improperly a party to it, if he had had a son. He died in 1810, and his funeral was attended by his daughter, and other relatives, but not by the son of Mrs. Morris. Upon the death of her father, Mrs. Davis took possession of his estates. The child of Mrs. Morris went, in his infancy by the name of Austin. When a boy at school he was called Williams; but in 1811, after Mr. Morris's death, he assumed the name, and claimed the estates of Mr. Morris, and endeavoured to establish his legitimacy by the following circumstances of access.

First Trial, 1827.

"Upon the trial of the first issue at the Spring Assizes in 1827, at Shrewsbury, it was proved that Mr. Morris occasionally went over from Argoed to Llanfair; that he sometimes visited Mrs. Morris, and that they had undoubtedly opportunities of sexual intercourse. One witness, Mary Evans, went so far as to say, that they met at the house of a Mrs. Lloyd, at Garthlwyd, in the spring of 1792, and passed the night there; and upon this the jury found a verdict for the plaintiff."

Case of Morris and Davis; Second Trial, July 1827.

In July 1827, a motion was made for a new trial before the Lord Chancellor, who expressed himself to the following effect:

"This is an application for a new trial of an issue tried at the last assizes for Shrewsbury; the question upon the issue being, whether the plaintiff was the legitimate son of William Morris and Mary his wife. The question was stated to be one of much importance to the parties, as the property is of considerable value; and it was also stated, in the course of the argument, and stated very properly, to be an important question in point of principle. It was argued very elaborately, and nothing was omitted in the argument which could throw light upon the subject. The only question now is, whether the result of the trial has been satisfactory to the Court—whether the Court can safely rely upon it as the foundation for its judgment. The counsel on the part of the plaintiff insisted, with much feeling, on the hardship to which the plaintiff was exposed in contending for what they called his birthright. It appeared to me, considering the question at issue, and the circumstances disclosed in evidence, that arguments and observations of this kind, if, upon a question for a new trial, they could ever be applied, were in no way peculiarly applicable here; because, whatever might be the conclusion in point of law, it appeared to me extremely difficult to say that, in point of fact, the plaintiff was not the son of William Austin; and such appears to have been the impression on the mind of the learned Judge before whom the issue was tried. Still, although the evidence is so strong that any reasonable mind would conclude that, in point of fact, the plaintiff was the son of William Austin, yet if, from the circumstances of the situation of Mr. and Mrs. Morris, he is to be considered, in law, as the son of Mr. Morris, he has a

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right to contend for what he calls his birthright—his legal right; and that right is to be treated with every consideration and respect. At the same time, it does not appear to me that he can, with much effect urge the hardship of the peculiar situation in which he is placed, and the difficulties with which he is surrounded, in establishing his claim to be the legitimate son of Mr. and Mrs. Morris.

"A great deal was said with respect to the law applicable to questions of this kind. It appears to me, after all that has taken place upon the subject, that no doubt can be entertained with respect to the rule of law as applicable to cases of this nature. It is perfectly clear, that when a husband and wife are not separated from each other by a sentence of divorce 'à mensâ et thoro,' the law will presume access; that is, in other words, sexual intercourse, unless the contrary is proved: and it is also laid down, and very properly so, that, in order to repel this presumption of law, 'the evidence must be clear and satisfactory; clear and satisfactory to the minds of those who are to decide upon the question: light presumptions will not be sufficient. The expressions of the Vice-Chancellor, in the case of *Head* v. *Head*[1], are, that the evidence must be 'clear and satisfactory.' It is stated by the Judges in the case of the *Banbury Peerage*[2], that the facts and circumstances, by which the presumption of law is to be repelled, must be such as to be satisfactory to the minds of the jury who have to try the question. Therefore, evidence arising from circumstances may be sufficient to repel the presumption, provided the inference to be drawn from that evidence be clear and satisfactory. Another question arises, and was suggested in *Head* v. *Head*, namely, whether the inference arising from the

[1] *Vide* p. 202, antea. [2] *Vide* p. 180, antea.

conduct of the parties may be sufficient to rebut the presumption of law. Undoubtedly, the evidence arising from the conduct of the parties may be most material and important; but whether such evidence alone would be sufficient to rebut the presumption, is unnecessary in this case to determine. In the case of the *Banbury Peerage*, the conduct of the parties, and the evidence thence arising, formed a principal ground of the judgment of the House of Lords.

" Having stated these principles, I shall endeavour to apply them to the facts of this case. These facts resolve themselves into two parts, and were so divided in the course of the argument, namely, the circumstances which took place at Llanfair, and the circumstances which occurred at Garthlwyd. There can be no doubt, that, after the separation, which was a voluntary one, Mr. Morris was frequently at Llanfair, and though these parties were separated they were not on terms of hostility with each other. It appears that when Mr. Morris visited Llanfair, he occasionally saw Mrs. Morris; and he may have had opportunity of sexual intercourse on those occasions. It is said the law will presume sexual intercourse to have taken place, and the time was referable to the proper period for the procreation of the infant in question. Such is the case on the part of the plaintiff, as far as it relates to the meetings of the parties at Llanfair. The answer to this case, however, is extremely strong upon those presumptions arising from the evidence. Mr. and Mrs. Morris were parted by a deed of separation; they lived at the distance of thirteen miles from each other, and met only occasionally. It is supposed that sexual intercourse took place between them in the spring of the year 1792. If it did, it is singular that it did not lead them to put an end to that separation. It was suggested on the part of the plaintiff, that sexual

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intercourse took place from time to time; but it is remarkable that they still continued to live apart.

" During this period, it is perfectly clear Mrs. Morris was living in a state of adultery. A person of the name of Austin, who had formerly been a servant in the family of Mr. Morris, lived with her, and was gradually advanced to the station of an equal. He dined with her; he directed the affairs of the house; he acted (such is the evidence) ' more like a master than a servant;' and he was seen in Mrs. Morris's bed at the period most material in the present inquiry. About Christmas 1792, a child was born; Mrs. Morris at that time, and for a year before, having lived in a state of adultery with Austin. When the child was born its birth was concealed; it was removed in the middle of the night to a distance from Llanfair, and was consigned to the care of the father and mother of William Austin. It was brought up under the care of old Austin and his wife. No communication was made to Mr. Morris of the birth of this child: he appears to have had no knowledge of its existence. About seven years afterwards, in consequence of some reports that had got into circulation, he reproached his wife with having had a child; she most strenuously and vehemently denied it. Subsequently, on a most material occasion, in speaking of the state of his family, he said he had only one child, Harriet. Having been at one time at variance with his daughter Harriet, on account of her marriage with Davies, he made a will bequeathing his property to his nephews. He afterwards revoked that will, and left his property to Mrs. Davies and her children, taking no notice whatever of any son. He executed a deed also, with respect to his property, in which he described Mrs. Davies as his daughter and heiress apparent: and it is perfectly clear that Mr. Morris, up to his death, had no knowledge of the birth of this

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son, of whom he is alleged to have been the father. The child, who had been consigned to the care of old Austin, when sent to school, passed, according to the evidence of the clergyman under whose tuition he was, by the name of Austin; he was recognized by William Austin as his son, and was called his son by him; he called Austin his father, and old Austin his grandfather. When William Austin was going in a military capacity to the West Indies, where he afterwards died, he bequeathed his property to this lad, passing by his own father and mother, who were in very necessitous circumstances. These facts are strong to show that this was the child, not of Mr. Morris, but of William Austin; and it was a question (I am now talking of what took place at Llanfair,) material for the jury to consider, whether, in reference to the occasional meetings of Mr. Morris with Mrs. Morris at Llanfair, followed by no return of Mrs. Morris to the house of her husband, the presumption of intercourse which would thence arise, is or is not sufficiently repelled by the circumstances to which I have adverted. I cannot assign even any plausible motive for the concealment of the birth of this child, and the other circumstances which I have mentioned, if sexual intercouse had taken place upon these occasions; and if the case rested here—and it may ultimately rest here, when it comes under the consideration of another jury—I should wish the jury to consider, whether those facts, to which I have adverted, are not, in their judgment, sufficient and satisfactory for the purpose of repelling the presumption of law, that sexual intercourse took place between these parties at the particular period to which I have adverted.

"The case, however, does not rest here: what is supposed to have taken place at Garthlwyd is very material and important. If it were established to my satisfac-

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tion that these parties, in the spring of 1792, had gone over to Garthlwyd to Mrs. Lloyd's house, and slept there together, the presumption of sexual intercourse having taken place would have been irresistible; and, strong as the other facts are, they would not be sufficient to repel the presumption. But look at the evidence; the evidence, in the first place, of Mary Evans. It is sufficient here for me to say, that she was contradicted by Mrs. Payne in two material and important circumstances. I do not mean to conclude that, because she was contradicted, she therefore speaks falsely as to those circumstances. It is possible that Mrs. Payne, by whom she was contradicted, may have spoken untruly; but, at all events, there is a most direct contradiction: and can I safely proceed on testimony so important as that given by Mary Evans, when her credit is thus impeached by the evidence of another witness? The jury have pronounced no opinion as to whether they believed Mary Evans; and I wish, when this question goes to a jury a second time, and she is again examined, that the opinion of the jury should be taken distinctly on that point,—whether they believe her evidence?

"There is another fact connected with the evidence of Mary Evans, most important to be attended to. She states that the visit to Garthlwyd took place in 1792; that Mr. and Mrs. Morris left the house of Mrs. Morris together for the purpose of going to Mrs. Lloyd's; that Mrs. Morris declared that they were going there, and that she remained absent during the whole of the night. It is a most extraordinary circumstance, if that be so, that, in her deposition in this Court, a fact so material should have been altogether omitted; for, in reading her deposition, that fact is nowhere to be found. Taking, therefore, into consideration that omission in the depo-

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sition of Mary Evans in this Court, the fact of that omission being supplied at the trial, and the contradiction of Mary Evans by Mrs. Payne, it appears to me that I cannot satisfactorily rely on her testimony. It is material, therefore, if this case is to be further investigated, that the jury should pronounce distinctly the opinion they entertain with respect to the truth of her evidence. But it is said her evidence is supported by Mrs. Lloyd. Mrs. Lloyd says, that Mr. and Mrs. Morris came to her house at Garthlwyd, and passed the night there; but she gives no date whatever to the visit. It is admitted on all hands, that these parties slept at her house at Garthlwyd in 1793, six years afterwards; and there is no reason whatever to apply the testimony which Mrs. Lloyd gave to the year 1792, in preference to 1798. From anything that appears to the contrary in the evidence of Mrs. Lloyd, she might be speaking of the year 1798. There is no confirmation whatever of Mary Evans's testimony arising out of the evidence of Mrs. Lloyd.

" It is further said, that she is confirmed by the testimony of John Williams, the coachman. He does not confirm her; for he describes circumstances entirely at variance with those described by Mary Evans. Mary Evans describes Mr. and Mrs. Morris as going on foot to the house of Mrs. Lloyd; and John Williams says, the one party came in the fore part of the day, and the other afterwards; that he was sent, in the earlier part of the day, to bring Mrs. Morris on horseback; and that Mr. Morris came in the evening of the same day. It is clear, therefore, that he must be speaking of a different visit from that deposed to by Mary Evans. John Williams says, he thinks the visit took place about thirty-five years ago; but I find a question was put to him which leaves the time very considerably in

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doubt: for he was asked whether, at the time when this visit took place, Mary Jones was in the service of Mrs. Lloyd; and he says, that she was. Now, Mary Jones did not enter into the service of Mrs. Lloyd until twenty-eight years ago. If, therefore, she was in the service of Mrs. Lloyd at the time to which the witness alludes, it is quite clear that John Williams, in saying that the visit took place thirty-five years ago, is in a mistake. It is possible he may have confounded Mary Jones with Margaret Jones; but I have no reason to suppose he did. They were both examined, they were both in the service; Margaret Jones left the service thirty-one years ago, and she was succeeded by Mary Jones. When he is asked, whether Mary Jones was in the service then, he says she was; if so, the visit, of which he is speaking, would correspond with the visit of 1798. I do not mean to say the fact was so; but according to the state of the evidence, it is left in doubt and uncertainty.

"I do not, therefore, find there is any thing in the case to satisfy my mind that, in 1792, these parties went, as it is supposed, to Garthlwyd to the house of Mrs Lloyd, and passed the night there, sleeping together. Had that circumstance been established to my satisfaction, the case would have presented itself in a very different light from what it does at present. I wish, therefore, that the case should be further considered; and when it is again submitted to a jury, I wish them to say, whether they find that these parties went, in 1792, to Garthlwyd and passed the night together at the house of Mrs. Lloyd?

"It has been stated in argument, that this case resembles *Head* v. *Head*; it bears no resemblance to it whatever. In *Head* v. *Head*, it is true, that the husband and wife were separated, and that there were occasional visits of the husband to the wife: these are the only cir-

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cumstances in which that case has any resemblance to the present. There was not the slightest evidence to show, in the case of *Head* v. *Head*, that the wife was living in adultery, when the child was procreated: the birth of the child was not concealed; on the contrary, as soon as the child was born, it was baptized in the name of the husband; it went by the name of the husband during the lifetime of the husband. After the death of the husband, Randall, who was the supposed or imputed father, married the widow; and then, for the first time, the child was called by the name of Randall; and the only circumstance to repel the presumption that the child was the child of the husband, was this change of names. Here, when the birth of the child took place, it was concealed; and, in the registry of baptism, the child is described as base born; he is baptized, not in the name of the husband, but in that of Evan Williams, and afterwards, at school, he goes by the name of Austin. That case, therefore, bears no resemblance whatever to the present.

"On the case as it now stands, I have no foundation on which I can safely proceed to determine definitively the rights of these parties. I should be merely guessing, were I to decide the cause from what passed at the trial of this issue. When this case goes to a new trial, I wish it to go free from any prejudice. I beg it to be understood that I have given no opinion as to the rights of the parties; I wish it to go to a new trial merely to have more light thrown on some of the points, particularly on those to which I have adverted. I wish to know whether credit is given by the jury to Mary Evans; whether they believe that, in 1792, the meeting took place at Garthlwyd and that Mr. and Mrs. Morris slept together at that place? If the jury find the same verdict, affirming at the same time these facts, it will be extremely difficult

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for me to say that the legitimacy of the plaintiff is not established."

Upon the second trial, at the Shrewsbury Summer Assizes in 1827, the jury gave no credit to the testimony of Mary Evans; but two other witnesses, Arthur, and Willings, were examined, who had not been called upon the first trial, from whose evidence it appeared, that in the year 1792, (although it is not stated in what part of that year), Mr. and Mrs. Morris dined together at the house of Mr. Morris's brother; and upon another occasion, in the same year, Mr. Morris came over to Llanfair, and dined and slept in Mrs. Morris's house: this evidence of access did not, however, satisfy the jury, and the verdict was now for the defendants.

Third Trial, 1828.

On the 14th of June 1828, the Lord Chancellor ordered a third trial, saying, "I have consulted the learned Judge who tried the cause (Mr. Baron Vaughan); he tells me, that if he had been upon the jury he should have found a different verdict. The Judge is not satisfied with the verdict; and considering that there was additional evidence on the last trial, and that the evidence on the first trial was at variance with it, I do not think that I could fairly and properly come to a decision of the cause at present."

The third trial took place at the Gloucester Summer Assizes, 1828, before Mr. Justice Gaselee. Neither Mary Evans, Arthur, nor Willings were examined, nor did the plaintiff give any additional evidence. The Judge, in summing up his charge to the jury, made the following remarks: "The Banbury Peerage is now the law. There is proof that the husband was in the wife's neighbourhood, and this is primâ facie evidence of intercourse; but it is competent in the defendants to rebut the presumption thus raised, by anything that amounts to satisfactory evidence that no intercourse took place. The question

then will be, first, whether you are satisfied there was that access between the husband and wife, that sexual intercourse might take place? Second, whether the evidence satisfies you, that no such intercourse did take place? If it might take place, the law presumes it did, unless the contrary is proved. Many witnesses proved opportunities. If you are satisfied there were opportunities, the law says, the child is the child of the husband[1]." Notwithstanding this decisive leaning of the Judge in favour of the legitimacy, the jury were unable to come to a decision; and after being shut up till they could fast no longer, were discharged without giving any verdict.

Case of Morris and Davis; Third Trial, 1828.

Application was again made for a new trial, but it was afterwards resolved to leave the whole case to the decision of the Lord Chancellor, who on the 1st of February 1830, delivered the following judgment:

" This case of *Morris* v. *Davis* has been long depending in this Court. The bill was filed in the year 1812; and at the hearing, an issue was directed, on the trial of which a verdict was found for the plaintiff. An application was made for a new trial; and it appeared to the Court, upon adverting to the evidence and other circumstances connected with the manner in which the question was put to the jury, that it was a proper case for further consideration. There was one of the witnesses, whose evidence, if believed, would have put an end to the case: but the Court had reason to think that there existed ground for doubting whether the evidence she gave was correct; and it was put to the second jury to say whether or not they believed her testimony. Upon the second trial, the jury were of opinion that she was

February 1830.

[1] " This is perfectly consistent with the arguments used by Mr. Justice Gaselee, as the advocate of General Knollys in the Banbury Peerage; but how shall we reconcile it with the *decision* in that case?"—*Edinburgh Review.*

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not entitled to credit; and they found a verdict for the defendant. The case went down to a third trial; the jury were divided in opinion; they came to no conclusion; and they were discharged. The result was an application for a further investigation: and it was at last agreed by counsel at the bar, that, for the purpose of saving further expense and delay, the application for a new trial should be abandoned, and that the case should be left, upon the whole of the evidence, as well on the trials as in the cause, to my decision. I have accordingly read and considered it with attention, and I am now to state the effect of that evidence as connected with the law applicable to this subject, and the conclusion which I have formed from the whole of it.

" It appears that Mr. and Mrs. Morris were married in the year 1778: they resided at Shrewsbury, where he practised in the medical profession. About 1788 they separated; and articles of separation were drawn and executed, in which it was recited that, in consequence of unhappy differences existing between them, they had agreed to live apart. A provision for Mrs. Morris during her life having been made by those articles, she went to reside at Llanfair; and after some little time Mr. Morris went to live at a place called Argoed, fourteen or fifteen miles distant from Llanfair. Although these parties separated, it does not appear that they were in a state of decided variance and hostility with each other. A young man of the name of William Austin, who had been taken into the service of Mr. and Mrs. Morris, as Mr. Morris described it, 'to clean his shoes,' was suspected of some familiarity with Mrs. Morris: he accompanied her, together with other servants, to Llanfair; but, notwithstanding that circumstance, some intercourse still continued to be kept up between Mr. Morris and his wife. The impression upon my mind, from the

evidence, is that the extent and the nature of that intercourse have been much exaggerated by the witnesses on the part of the plaintiff. I cannot help looking at the evidence as to this point with a considerable degree of jealousy and suspicion, when I find, upon the first trial, a witness deposing to certain facts, which, if established, would have been decisive of the cause, and the same witness afterwards, upon a subsequent trial, wholly discredited by the jury; and further, that upon the successive trials which have taken place, witnesses have been called on one trial to material and important facts, and, upon a subsequent trial, those witnesses have been withdrawn, from an apprehension that their former evidence might be contradicted; for that, indeed, was avowed at the bar.

"These circumstances, therefore, together with the testimony, on the part of the defendant, as to the character of Mr. Morris,—his retired habits, his disposition to live constantly at home,—lead me to consider that the evidence with respect to the extent and the nature of the intercourse between Mr. and Mrs. Morris, after their separation, has been considerably exaggerated. Some facts, however, are incontrovertible, or at least are established to my satisfaction: that Mr. Morris was in the habit of going over from time to time from Argoed to Llanfair while Mrs. Morris resided there; and that upon some of those visits he, in company with her, gave directions with respect to the conduct and management of the property. There is also sufficient evidence to satisfy my mind that, on more than one occasion, he was in her house, and that he sometimes walked with her. I cannot, according to my impression, carry the evidence beyond the circumstances which I have stated.

"Mr. Morris was living fifteen miles off, at Argoed. Austin, who had accompanied Mrs. Morris to Llanfair,

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continued to reside for many years in her service; he remained in her service till he entered the army. In the spring of the year 1792, Mrs. Morris became pregnant. That pregnancy was not communicated to Mr. Morris; she endeavoured to conceal it as far as she was able. About the close of December 1792, she was delivered at night of a male child; and there is sufficient evidence of identity to satisfy me that that male child is the present plaintiff. Immediately after she was delivered, the man who had the care of the horses was sent out of the way; the child was wrapped carefully in flannel; two horses were taken from the stable; a woman, of the name of Ann Evans, who assisted at the delivery, and Austin, who was present about that time, and in the house, and who is described as being in a state of considerable agitation, mounted these horses, and set off with the child towards a place called Wem, about thirty miles from Llanfair. When they arrived within a short distance of Wem, the woman, Ann Evans, was left upon the road with the child, while Austin rode on to his father's house, who was a weaver, carrying on business at Wem. Mrs. Austin, the mother of Austin, came and received the child; and Austin and Ann Evans returned to Llanfair with as much expedition as they could use. On their arrival there, it appears that Ann Evans was anxious to go about, and show herself as much as possible, that no suspicion might be entertained of her absence. Thus the greatest care appears to have been taken, at the risk even of exposing the life of the child, to conceal the circumstance of Mrs. Morris's delivery.

"The child was shortly afterwards baptized at Wem by the name of Evan Williams, and was described as a 'base-born child.' He continued for a considerable time in the house of Mr. and Mrs. Austin, the father and mother of William Austin. When he had attained

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the age of five or six years, he was put to school, by the name of Evan Austin, with a gentleman of the name of Walker, the clergyman of the place; and he was maintained at the expense of Mrs. Morris. The boy was afterwards removed to a school at High Ercal. He was there called by the name of Evan Williams, by which he had been baptized, but was described also by the name of Evan Austin. Mrs. Morris from time to time saw the child, and treated him as her son; and during the whole of this period he was treated and obviously considered by Austin as his son. Austin, before he left England (for he afterwards went to the West Indies), made his will. He was possessed of some little property; his father and mother were in low and distressed circumstances; yet, by that will, passing over his father and mother, he disposed of all his property in favour of this boy. He then went to the Isle of Wight: while there he corresponded with one Martha Carswell; several of the letters are in evidence; and the whole of that correspondence shows that he considered this boy as his son. He went to the West Indies, and died there in the course of about two years. The news of his death arrived in this country, and was communicated at the school; and the boy was put into mourning as the son of Austin. The evidence is clear and satisfactory as to Austin living in a state of adultery with Mrs Morris; the pregnancy was concealed; the birth was industriously concealed; Austin was acting in that concealment; no communication whatever of any of the circumstances was ever made to Mr. Morris. Mr. Morris knew nothing of the delivery of Mrs. Morris; he knew nothing of the birth of this infant; he lived for seventeen years afterwards, considering his daughter Harriet as his only child. In the year 1799, Harriet married Mr. Davies without her father's consent. He was incensed

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against her, and made a will, by which he disposed of the whole of his property in favour of a nephew. In the year 1807, he was a party to an instrument in which he described Harriet Davies as 'his only child and heir at law.' In the year 1808, having been reconciled to his daughter, he disposed of his property in favour of her and her children; and no notice whatever was taken by him of any other child. It appears, indeed, that in a conversation which he had with Mrs. Morris in the year 1799, he stated some reports, which had accidentally reached his ear, of her having had a child; but she replied by a vehement and peremptory denial. The child, therefore, was recognised on the one side as the child of Austin; on the other, no knowledge whatever of such child having been born ever reached Mr. Morris: the existence of such a child was never communicated to him: in no one instance did he act upon the supposition of there being such a child: there was nothing but a vague report, which was instantly contradicted by Mrs. Morris. The question is, whether, under these circumstances, the plaintiff has made out his claim to be the legitimate son of Mr. Morris?

"There is no doubt or difficulty, as it appears to me, with respect to the law applicable to this question. It was stated clearly and distinctly by the Judges in the case of the *Banbury Peerage*; and I consider the opinion expressed on that occasion, not as laying down any new doctrine, but as arising out of and founded upon the previous decisions. On that occasion, the Lord Chief Justice of the Common Pleas stated the unanimous opinion of the Judges in these precise terms: 'That, in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed

to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of such child.' The question, therefore, is a question of fact, whether sexual intercourse took place in the spring of 1792 (for that is the period to which reference must be had), between Mr. and Mrs. Morris. In the absence of all evidence, either on the one side or on the other, the law would presume that such sexual intercourse did take place.

" It was argued at the bar, that the doctrine contained in the opinion which I have stated has been affected by a case decided in this Court, the case of *Head* v. *Head*. In truth, however, *Head* v. *Head* does not, in the slightest degree, affect the opinion delivered by the Judges in the case of the *Banbury Peerage*. It recognises and adopts that opinion; and all that is said by the present Master of the Rolls is, that the Court, which is to be satisfied that sexual intercourse did not take place, must be so satisfied, not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt, in the minds of the Court or jury to whom the question is submitted. Therefore, in deciding this case, I look upon it that the point, to which I am to direct my attention as a question of fact, is this, whether the circumstances are such as to satisfy me that no sexual intercourse did take place between these parties at the period to which reference is had?

" In addition to the intercourse between the parties at Llanfair, which I have already taken notice of, I ought to advert to two other circumstances which have been

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relied upon. One is the visit to Mrs. Lloyd, at Garthlwyd. Mrs. Lloyd proves that, at the time when these parties were separated, the one living at Llanfair and the other at Argoed, they paid her a visit at Garthlwyd: she says they passed the evening and the night at her house, and she supposes they slept together. In her evidence in the cause in this Court, she states this visit to have taken place 'about twenty years ago or more, but that she cannot be precise with respect to the time.' That would carry it back to about 1800. When she was examined on the trial, she could mention no time to which that visit was to be referred. The coachman was called; and he referred the visit precisely to the spring of 1792; for he stated it to have been thirty-seven years ago, from the period when he was examined upon the last trial. There does not appear to have been anything to guide his recollection as to a transaction which took place so long ago, so as to enable him to fix it, with any degree of certainty, at that period; at least no circumstance having that tendency was stated; and it is singular that he should have hit upon the particular period, which would have so exactly accounted for the pregnancy which gave birth to this child. It is observable, that he is contradicted as to the time of the visit by Mrs. Lloyd; at least he does not agree with that lady: he is also contradicted by the two females who lived in Mrs. Lloyd's house successively as servants, the one immediately following the other: both of these witnesses state distinctly that no such visit did take place at the time alleged; and one of them mentions, that in 1798 a visit did take place, when Mr. and Mrs. Morris slept there in different rooms. For these reasons, I pay little attention to the evidence of the coachman; though I consider it as a fact that these parties, at some period during the separation, probably about the year 1798, when some-

thing like a reconciliation appears to have taken place, went and passed the evening and the night at Mrs. Lloyd's at Garthlwyd. The other circumstance connected with the intercourse between Mr. and Mrs. Morris, which I ought also to notice, is this, that in the year 1799, at the period when disputes took place in consequence of the marriage between Harriet Morris and her present husband, and when dissatisfaction was felt by Mr. Morris in consequence of that marriage, Mrs. Morris appears to have gone over to Argoed, and to have passed some days at the house of Mr. Morris, on two different occasions. The witness, who was examined, gave evidence, that at that time Mrs. Morris, although she passed some days at the house, slept in a distinct and separate part of the house, and did not pass the night with Mr. Morris.

" Having noticed these two circumstances, I come back to the question of law. I have stated the opinion delivered by the Judges in the *Banbury Peerage* case; I will now refer to what was said on that occasion by Lord Redesdale. That most learned, able, and acute lawyer expresses himself thus[1]: ' I admit the law presumed the child of the wife of A., born when A. might have had sexual intercourse with her, or in due time after, to be the legitimate child of A.; but this was merely considered as a ground of presumption, and might be met by opposing circumstances. The fact, indeed, that any child is the child of any man is not capable of direct proof, and can only be the result of presumption; understanding, by presumption, a probable circumstance drawn from facts either certain or proved by credible testimony, by which may be determined the truth of a fact alleged, but of which there can be no direct proof.' He also says, ' It is, therefore, of high

[1] *Vide* postea.

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importance to consider, in a question of legitimacy, whether the fact of such acknowledgment as would demonstrate the legitimacy did take place, or whether by circumstances such acknowledgment was rendered impossible, as by the child being a posthumous child. If, on the contrary, it appears that the supposed father was ignorant of the birth of such a child, and that the fact of its birth was concealed from him, such concealment is strong presumptive proof that there had existed no sexual intercourse which could have made him the father of such child.'

"Such was the opinion of the noble and learned person to whom I have referred. Lord Ellenborough's opinion, though delivered in more general terms, coincides with that given by Lord Redesdale; these were followed by the opinion of Lord Eldon to the same effect. Lord Erskine considered it necessary to prove the actual impossibility of sexual intercourse having taken place; but no lawyer will now contend that that opinion can be sustained. The case comes back, therefore, to the question of fact (about the law there is no doubt); are the circumstances of this case such as ought to satisfy the person who has to decide upon it, that sexual intercourse did not take place between Mr. and Mrs. Morris in the spring of 1792?

"Having already stated the facts of the case, I shall not repeat, but shall merely refer to them. Mr. and Mrs. Morris, though separated, had, to a certain degree, communication with each other. It must, however, be remembered, that, at that time, Austin was carrying on an adulterous intercourse with Mrs. Morris; and it must also be remembered (for that occurs in the evidence of many of the witnesses), that Mrs. Morris had a personal dislike to her husband, which she expressed in the strongest and coarsest terms. These things are

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not to be omitted in considering the question, whether sexual intercourse did or did not take place between them, notwithstanding the separation. When Mrs. Morris became pregnant, she made no communication of that circumstance to Mr. Morris; and no reason, in point of evidence, has been assigned for that concealment: she was exposing her character without necessity, if sexual intercourse with her husband had taken place. At the time when the child was born, the birth of that child was concealed: it was industriously and carefully concealed, and concealed from Mr. Morris; and Austin was acting in that concealment. What reason can be assigned, or, in point of evidence, has been assigned, for this conduct, except the desire that the fact should not be known to Mr. Morris? Mrs. Morris was hazarding her reputation; she was endangering the life of her child; she was depriving that child of its prospects as the heir of Mr. Morris, and she was giving it only the hope of being the heir of a person who was destitute of property. Surely these are circumstances so strong, that they ought to be encountered by some evidence tending to show a probable reason why that concealment should have taken place. It was not a mere momentary act; it was followed up throughout. The mother allowed the child to be removed from her, and to be christened as 'a base-born child.' She allowed it, during the lifetime of Austin, up to the period of his death, to pass as the child of Austin. When she was charged, in consequence of some reports, with having had a child, she strongly denied the accusation; and during the seventeen years that Mr. Morris lived, she never whispered to him that she ever had any other child than Harriet Davies. I require, then, when I am coming to a conclusion of fact, as to whether or not sexual intercourse did take place between these parties,

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I require some reasonable and satisfactory ground upon which that concealment may be explained.

" But what is the representation which the present plaintiff himself gives of all these transactions as collected by himself—the result of his own inquiries. It was proved on the last trial, and is in evidence in the cause. ' I was born,' he says, ' in the White House, Llanfair: when born, Saturday, market-day, my father came trembling, and said, ' Ann, what shall I do?' ' Don't be afraid; we shall do very well.' As soon as I was born, I was kept warm by him, taken into a malt-house, and sent on; and Ann followed at edge of night, and Ann rode within a mile of Wem before she alighted, and then gave me to my father, when she told Mr. Austin to take me to Wem: and they both turned back, and got to Llanfair at the night of next day, when she went to many shops to buy things, that people might not think she went out. Mrs. Morris, at that time, kept her bed. She took a flasket of wine and biscuit for me on the road. Miss Gwynne was not present at my birth, but was backwards and forwards at that time, and knew of it; and when Mrs. Morris and her fell out, she asks her, ' Where is the child without a father?' This is the history of the transaction, as collected by the plaintiff himself in the course of the inquiries which he had made upon the subject, and which was contained in a book in his own hand-writing.

" I endeavoured in the course of the argument to obtain some reason for this concealment. It was said at the bar, that it might be referred to this circumstance,—that Mrs. Morris was not fond of Mr. Morris; that she disliked him; that she wished to continue to live separate; and that she might have supposed, if the circumstance had been communicated to him, it would have affected the separation. This, however, is an argument

against the probability of her having permitted sexual intercourse to take place between them. But the argument is also inconsistent with the statement she herself made, as proved by the evidence of Miss Gwynne, whom she compelled to go down upon her knees and to promise that she would keep the affair concealed. It is quite inconsistent with the particular declaration she at that time made; and to which declaration I refer, not for the purpose of proving that the child was the child of Austin, (for it cannot be made use of for that purpose,) but for the purpose of negativing the speculative reason which has been assigned at the bar for the concealment.

" Again, it has been suggested, that as she was attached to Austin, she might not wish him to be apprised of that species of infidelity on her part—her having connexion with her husband. But to adopt such a view of the transaction, would be to forget the character of the parties: it would be to suppose a degree of refinement, altogether incompatible with the established facts, to have existed in the intercourse between Austin and Mrs. Morris,—the servant and the mistress,—persons who appear, by the evidence, to have been of the coarsest character as to morals and conduct. Such a theory is of too speculative a nature for the Court to adopt it as an ingredient in its judgment. The concealment, coupled with the other circumstances of the case, and the utter ignorance in which Mr. Morris was kept to his death, a period of seventeen years, with respect to the transaction, satisfies me as a conclusion of fact, that no sexual intercourse did take place between Mr. and Mrs. Morris at such a period as could have rendered the child the offspring of Mr. Morris.

" In giving this judgment, I affect no rule of Law. I state the rule as I find it. It is founded on sound sense:

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and, as I am bound to do, I acquiesce in it. I have come, like a jury, to a conclusion of fact. The circumstances of the case are such as to lead me to that conclusion, not, as I think, upon a bare balance of probabilities, but as the result of the thorough conviction of my mind, founded upon a careful and patient attention to all the evidence in the case. I am bound, therefore, having this impression, to state my opinion, that the plaintiff is not entitled to the property in dispute as the son of Mr. Morris[1]."

From this judgment it is intended to appeal to the House of Lords, before which the case is to be argued in the ensuing Session of Parliament.

Case of Bury and Phillpot, 1834.

The last case in which the Law of Adulterine Bastardy appears to have been discussed was in that of *Bury* v. *Phillpot*, before the Master of the Rolls, Sir John Leach, on the 14th of January 1834.

" William Phillpot, by his will, dated in 1797, gave an annuity of 60*l.* a year for the sole and separate use of his daughter, Ann Pollock, to be paid to her by his executor in weekly payments; and after her decease, he gave the same to any child or children of her body, to be equally divided among them if more than one.

" The Bill was filed against the executor by Mary Ann Bury, and by James Gadsden, and Jane, his wife; the female plaintiffs claiming to be entitled in equal shares to the annuity of 60*l.*, as the two daughters of Ann Pollock, deceased; and the question in the cause was, whether they were legitimate children? The testator's daughter had married her husband, Pollock, against her father's consent, in 1794. She and her husband disagreed, and in a few weeks after the marriage

[1] For a copy of Lord Lyndhurst's two judgments, corrected by himself, the Author is indebted to his friend James Russell, esq., of the Chancery bar.

she returned to her father's house, and remained there until her father's death, which happened in the year 1800. The evidence on the part of the defendant went to show that, shortly after her father's death, Ann Pollock formed a connexion with a labouring man named Hughes, with whom she cohabited, and that the children were born during such cohabitation.

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" On the other side, there was evidence that the husband took a lodging opposite to the house in which his wife and Hughes resided, and that he had interviews with her from time to time; the object of which interviews, however, appeared generally to be to obtain money from her. On some of these occasions the husband treated his wife with apparent kindness, but he generally conducted himself towards her with great brutality. The eldest of the children was baptized in 1802 as the daughter of *Alexander* and *Ann Pollock*; there was no evidence of the baptism of the other."

It was stated on the part of the Plaintiffs:—" The rule of law upon this subject, as it is to be deduced from the opinions of the Judges in the *Banbury Peerage* case, is clearly laid down in the case of *Head* v. *Head*[1]. The corollary from those opinions is there said to be, ' that wherever a husband and wife are proved to have been together at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was, *primâ facie*, to be presumed; and that it was incumbent upon those who disputed the legitimacy of an after-born child to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which might afford a balance of pro-

[1] *Vide* p. 202, antea.

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babilities against the fact that sexual intercourse did take place.' To apply this principle to the present case, what is there to oppose to the admitted fact that interviews from time to time took place between the husband and wife? Is there any evidence of circumstances, affording irresistible presumption that the usual consequence of such interviews—that consequence which the law, founded upon, and confirmed by the experience of mankind, infers from such interviews—did not take place? Clearly not. The fact of the wife having maintained an adulterous intercourse, for whatever period of time, with another man, affords no such presumption. Let the husband and wife be once brought together under circumstances which afford the husband an opportunity of becoming the father of a child born in due time afterwards, and the law will fix the husband with the paternity, though the wife may have slept with another man every night in the year preceding, and the year succeeding the interview. The fact of access not being denied, there is no ground for disputing the claims of the plaintiffs, or for resorting to a jury, which might indeed find a verdict inconsistent with law, but which could not by possibility assist the conscience of the Court in a case where the Court is already competent to determine, and bound to declare the rights of the plaintiffs."

On the other side it was said :—" It is too unqualified a proposition to say, that any interview between a husband and wife, living separate from each other, at which the husband might by possibility avail himself of his marital privileges, will, in case of a child being born in due time afterwards, fix him with the paternity. That which is *primâ facie* possible, or even probable, may appear, upon investigation, to be physically or morally impossible : physically, as in cases of bodily infirmity ; morally,

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as where the circumstances or place of meeting render it in the highest degree improbable that sexual intercourse should have taken place. The inference of law may be rebutted by circumstances, not amounting indeed to proof—for a negative is incapable of proof—or perhaps to irresistible presumption, but still it is abundantly sufficient to satisfy any reasonable mind that sexual intercourse could not have taken place; and such circumstances can only be properly investigated by a jury. In *Morris* v. *Davies*[1] repeated issues were directed by Lord Lyndhurst, in order to satisfy the conscience of the Court upon the disputed fact, whether interviews between the husband and wife had been such interviews as afforded an opportunity of sexual intercourse. This is exactly the fact upon which the conflicting evidence in the present case throws a doubt, and the case is therefore one upon which the Court cannot satisfactorily decide without the assistance of a jury."

The Master of the Rolls (Sir John Leach):—"Access is such access as affords an opportunity of sexual intercourse; and where the fact of such access between a husband and wife, within a period capable of raising the legal inference as to the legitimacy of an after-born child, is not disputed, probabilities can have no weight, and a case ought never to be sent to a jury. There is nothing against the evidence of access, except evidence of the adulterous intercourse of the wife with Hughes, which does not affect the legal inference; for if it were proved that she slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate. The interest of the public depends upon a strict adherence to the rule of law[2]."

[1] 3 *Carr & Payne*, 218, 427, and antea.

[2] 2 *Mylne & Keane*, 349.

Case of Shelley *v.* ——, 1806.

The two following cases, of *Shelley* v. ——, and *Clarke* v. *Maynard*, were accidentally omitted in their proper places in the chronological series.

In the case of *Shelley* v. —— a motion was made by the plaintiff in the Court of Chancery in August 1806, that several witnesses should be examined *de bene esse*, under the following circumstances, suggested by the Bill and supported by affidavit. The plaintiff claimed, in the event of the death of a woman without issue, suggesting that she has no issue, having left town without any appearance of pregnancy; or, if she had a child, that it was not legitimate, her husband during the whole time, while she was in London, having been in Sussex. The plaintiff proposed to examine the witnesses respectively to several distinct circumstances, establishing that fact; the affidavit representing the several circumstances material to the plaintiff's case as resting solely on the knowledge of those individuals respectively. An infant was made defendant, as claiming to be a legitimate child. An appearance was put in, but no answer, after two orders for time, and an attachment, and it was suggested that the defendant was conveyed out of the way.

In support of the Motion it was said:—" Generally there are but three cases in which the examination *de bene esse* is granted: 1st, where the witnesses are of such an age that there is probability of death before the cause can be heard, which age is settled to be seventy years; 2ndly, where they are shortly to quit the kingdom; 3rdly, where the fact depends upon the examination of a single witness. In the two last cases the examination *de bene esse* is permitted without regard to age. The cases of *Shirley* v. *Earl Ferrers*[1], *Pearson* v. *Ward*[2], and *Lord*

[1] 3 *P. Will.* 77. *See* 6 Vesey, 254; and the note, 255.

[2] 2 *Dick.* 648.

Case of Shelley v. ———, 1806.

Dursley v. *Fitzhardinge Berkeley*[1], are authorities for such a Bill. The distinction of this case, which is much stronger than those, is, that this is an application to examine several persons to a long chain of distinct circumstances, which are necessary to make out the plaintiff's negative case, and which he undertakes to prove: important facts being sworn to lie in the knowledge of particular individuals, to which no other person is privy, and which may be very material to the plaintiff's case, and this infant defendant is kept out of the way; so that the plaintiff is not in a situation to hear his cause. The best course will be, that the place where the infant is should be disclosed; that he might be brought into Court by the messenger; and that one of the six clerks may be assigned as a guardian to put in an answer for him.

The Counsel for the infant defendant resisted the motion, observing that the allegation is, that the defendant, an infant, born in 1789, is a supposititious, or at least an illegitimate child; that the father was one of the witnesses to be produced, and the infant therefore completely unprotected, unless protected by the Court; and that, by the advice of Counsel, no answer was put in.

The Lord Chancellor (Lord Eldon):—"The best course will be that which has been proposed, for upon the reason and justice of the case I should have no doubt in granting this application, though this does not come within any of the three cases; 1st, witnesses of the age of seventy years; 2ndly, witnesses quitting the kingdom; 3rdly, a fact depending upon a single witness; and, as Lord Thurlow said [2], 'I would make a precedent if there is not one.' The law of England has been more scrupulous upon the subject of legitimacy than any other, to the extent even of disturbing the rules of reason. Formerly, access was presumed, if the parties were within

[1] 6 Vesey, 251. [2] *Pearson* v. *Ward* 2 *Dick.* 618.

Case of Shelley v. ———, 1806.

the narrow seas, though there was no doubt of the contrary. Since that time [1], access or non-access must be proved like any other fact, but it must be proved by witnesses who altogether prove that, though each speaks only to some particular circumstance.

" The effect of this affidavit is, that these are necessary and material witnesses to prove circumstances of this kind. The death of one, by which one link in the chain would be lost, might have the same effect as the death of all. From the peculiarity of the case of access or non-access, legitimacy or illegitimacy, great indulgence is to be applied. I have frequently witnessed the misery occasioned by the death of witnesses [2]."

Case of Clarke v. Maynard, 1822.

The case of *Clarke* v. *Maynard* occurred before the Vice-Chancellor on the 15th of May 1822. Upon a claim to the benefit of a settlement, the *Master* reported against the legitimacy of the children, and exceptions were taken to his report. The mother lived with a man and assumed his name, and the children were born during such cohabitation, and took the name of the man. But during all this time the husband was alive, and lived either in London, where the wife resided, or in the neighbourhood. The case of the *King* v. *Luffe* was relied upon, and it was insisted that there was not in this case that impossibility of legitimacy which, within the principles of that case, would bastardize the issue.

The Vice-Chancellor (Sir John Leach):—"The manner in which this case is argued would in effect revive the old principle of *extra quatuor maria*. Now, access, like any other important fact, must be satisfactorily established, but access is not to be presumed because the parties were within such distance that access was possible. I cannot encourage an issue, but I will not refuse it to the children, if they desire it [3]."

[1] *Pendrell* v. *Pendrell*, antea; *The King* v. *Luffe*, antea; *Head* v. *Head*, antea. [2] 13 *Vesey*, 56. [3] 6 *Maddock & Geldart*, 364.

General Remarks.

An attentive consideration of the preceding authorities and cases will, it is presumed, lead to the following conclusions:

I. That from the earliest period when any writer on the Law of England flourished, or in which any decisions were reported, to the commencement of the eighteenth century, the maxim that "*Pater est quem nuptiæ demonstrant*" prevailed in all its integrity, and was subject only to *three* exceptions; namely, proof of the impotency of the husband, of his being separated from his wife by sentence of divorce, or of his being at so considerable a distance from her when she became pregnant, that it was *impossible* for him to have begotten the child.

II. That in the thirteenth century, when Bracton wrote, the *primâ facie* evidence of legitimacy of a child born in wedlock, could only be rebutted by evidence of non-access, which evidence consisted of proof that the husband was not in the same "province"[1] or realm with his wife for some time before her conception. Like the Digest, Bracton in one place fixes the period at two years, and he states that in all cases, and under every circumstance, if a husband and wife had cohabited together, and were capable of the functions of generation, even if she became pregnant by another man, and whether the husband repudiated or acknowledged the child, it was legitimate by presumption, which presumption did not admit of proof to the contrary.

III. That precisely the same principles of Law are stated in the next legal treatise which is now extant, that of Britton.

[1] "Provincia." Though in a former part of the volume this word is supposed, in the sense in which Bracton uses it, to have meant "county," it would perhaps have been more correct to have given to it its literal meaning.

General Remarks.

IV. That, as the Common Law applied the term "*mulier*," to describe children who, though legitimate *de jure*, were not begotten by the husbands of their mothers, it always contemplated the possibility of a succession to the husbands' inheritance by persons, under the character of sons and heirs, who were not begotten by them, for the purpose of preventing uncertainty, litigation, and the chance of committing injustice towards innocent parties.

V. That a difference always existed, respecting the status of children, between the Ecclesiastical and Common Law of this country, from which difference the anomaly arose, that a man might be legitimate by one Law, and bastard by the other, and *è converso*. This discrepancy caused much confusion, and may explain the few apparent contradictions in the Year Books; as it thus depended upon the Court in which the question of bastardy was tried, and upon the Law which happened to be alluded to, whether the party was legitimate or illegitimate; and if from any circumstance the Ecclesiastical Court once obtained jurisdiction, its sentence was conclusive, and could not be reversed by the Temporal Courts, even in cases where the party was "*mulier*," and consequently inheritable by the Common Law.

VI. That the important case of *Foxcroft*, in the 10th Edw. I., which is the first that is reported, and which has been cited by the highest authorities, to show that the legal presumption of legitimacy might always be rebutted by evidence that the husband was not the father of his wife's child, although neither impotent nor absent from the realm at the moment when it was conceived, has been entirely *misunderstood*; that it establishes no such point; and, consequently, that the deductions which have been drawn from it are erroneous; and also that similar inferences which have been deduced from the

case of *Radwell,* in the 18th Edw. I., are not justified by the facts.

VII. That as early as the 43rd Edw. III. the rule of the "four seas" undoubtedly prevailed; and although the term does not occur before that time, the same principle may be traced in Bracton and Britton; and the rule itself is evidently alluded to in the case in the 33rd Edw. III., when the dictum of a Judge of Assize, that "if it could be proved that a woman separated from her husband, lived with another man, and had a child by the adulterer, it would be a bastard," called forth a denial of the accuracy of that statement from the contemporary reporter, who added, "In this he spoke against the Law, as I believe, if the husband were within the realm[1]."

VIII. That in the entire series of cases in the Year Books and Reports until the eighteenth century, there are but *three* instances in which the rule of the "quatuor maria" was not admitted to be Law; or in other words, in which the absence of the husband from the realm at the time of his wife's conception was not insisted upon as being indispensably necessary to bastardize the child; namely, in the 33rd Edw. III. above alluded to, when the dictum of the Judge was contradicted by the reporter; a case in the 40th Edw. III., when the Judge appears to have included in the "special matter" the fact of the mother having "continued in adultery[2];" and the case in the 11th Hen. IV., where the same doctrine was repeated[3]; but these dicta are contradicted by the opinion of the Courts on every other occasion, as well before as afterwards, and they seem therefore not to have been sound Law, in proof of which it is only necessary to refer to the case in the 18th Edw. IV., the last on the subject in the Year Books, on which occasion

[1] p. 36, antea. [2] p. 43, antea. [3] p. 49, antea.

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Justice Choke said, in illustration of the statement of Justice Littleton (the author of the Treatise on Tenures), who had remarked that there were several cases in which a man is a bastard by the Common, and mulier by the Ecclesiastical Law, and *è converso*,—that "if a woman elope from her husband and has issue in her adultery, she shall lose her dower, and *the issue shall be mulier in our Law*; and yet *bastard by the Spiritual Law*[1]."

X. That the circumstance of there being no case in the Year Books or Reports, in which the Law of Adulterine Bastardy was mooted from the 18th Edw. IV. to the 40th Eliz., a period of about one hundred and twenty years, can only be attributed to the Law being *settled*, which inference is strongly supported by the facts of the cases of *Beaumont*[2] and *Cornwall*[3], which have been taken from other sources; by the proceedings in the cases of *Lady Parr* and *Lady Burgh*, whose issue were bastardized by Acts of Parliament, because, as one of the Acts states, "though such issue were notoriously known to have been begotten in adultery, yet, being born within espousals, they were by the Law of this Realm inheritable;" and as the other Act recites, though the wife had "confessed the children were begotten in adultery during the espousals, they were by the Laws of this Realm legitimate and inheritable[4];" and by the opinion of the only writer of the period who treated on the Law of Legitimacy[5].

XI. That in the sixteenth century the Law was unanimously declared as is above stated, by the Lord Chancellor, the Chief Justice of the King's Bench, and the Chief Justice of the Common Pleas, in the case of *Done* and *Egerton*, in the 14th Jac. I.[6]; and it is so laid down by every contemporary writer on the Law; namely, Lord Coke, Finch, and Ridley; in the

[1] pp. 53, 54, antea.

[2] p. 57, antea. [3] p. 66, antea. [4] p. 60, antea.

[5] Clerke's Trial of Bastardy, p. 65, antea. [6] p. 71, antea.

Abridgments of Fitz-Herbert and Brooke, as well as in those of Rolle, Shepherd, and Danvers, which were written in the same century. General Remarks.

XII. That it consequently appears that Lord Coke's definition of the Law in the First and Fourth Institute, which was impeached by Lord Redesdale in the *Banbury* case[1] as "not being the Law of England, but a certain Law laid down by Lord Coke," as not being "borne out by the authorities referred to, and as being inconsistent with the earlier and later decisions," is supported by the whole current of authorities, with the three exceptions of the cases in the 33rd and 40th Edw. III., and 11th Hen. IV., before alluded to.

XIII. That the Attorney-general, who admitted, and the Lords' Committee for Privileges, who in the year 1661 twice reported, that Nicholas Knollys, Earl of Banbury, was "a legitimate person in the eye of the Law," did *not*, as has since been alleged, "*mistake the Law.*" The correctness of their opinions is also shown by the Bill for bastardizing the children of Lady Roos in 1666, which declared, that though they were notoriously begotten in adultery after she had eloped from her husband, yet "by the Laws of this Realm" they "are or may be accounted legitimate, and may inherit the honours, &c.[2];" by the opinions of the Attorney-general, Sir William Jones, and Lord Chancellor Finch, afterwards Earl of Nottingham, in the *Purbeck* case, in 1678[3]; and by the cases of *Rex* v. *Albertson*, in 1697[4], and the *Queen* v. *Murray*, in 1704[5], on which occasions the rule of the *quatuor maria* was *expressly alluded to* by Chief Justice Holt and the other Judges of the Court of King's Bench.

The preceding brief summary brings the history of the Law of Adulterine Bastardy down to the year 1706, the

[1] *Vide* p. 461, postea. [2] p. 88, antea.
[3] pp. 114-116, antea. [4] p. 118. [5] p. 120.

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5th of Anne, when the case of *St. George* v. *St. Margaret* occurred, which laid the foundation for the important change that soon afterwards took place of exploding the rule of the "quatuor maria," and admitting evidence to prove non-access on the part of the husband, notwithstanding he might have been in the realm when his wife became pregnant. This alteration arose, as has been shown, from a supposed decision of Lord Hale in the case of *Dicken* and *Collins*, between 1656 and 1658, which is not reported, and about which great doubts may be entertained. The reasons [1] for disbelieving that Lord Hale gave the judgment imputed to him, or that his opinion on the subject was different from that of Lord Coke and of his other predecessors, have been stated; and it is presumed that they are sufficiently strong to shake the confidence which has hitherto been placed in that precedent, for it has been shown that it had no weight with the Lord Chancellor or Attorney-general in the *Purbeck* case in 1678, or with Lord Holt and the other Judges of the Court of King's Bench in the cases of *Rex* and *Albertson* in 1697, and *Regina* v. *Murray* in 1704; that it would appear from the manner in which the Attorney-general adverted to the case of *Hospell* and *Collins* in 1693, that the child whose legitimacy was then in question was altogether *supposititious* [2]; and that even the allusion to that decision in the case of *St. George* and *St. Margaret* in 1706, when it was cited as a precedent, by no means proves that Lord Hale's decision was at variance with the old Law [3]. To the arguments which have been submitted to show that the dictum of Lord Hale was not cited as a precedent for exploding the rule of the *quatuor maria*, and that the case of *St. George* and *St. Margaret* (in

[1] *Vide* pp. 124–126. [2] p. 405, postea. [3] p. 122, antea.

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which the parties were divorced *à mensâ et thoro*), did not proceed upon any change in the ancient Law, must be added the cogent and almost conclusive fact that the case of *St. George* and *St. Margaret* was decided by the *same Court*, and by *three* of the *identical Judges*[1] who decided the case of *Rex* v. *Albertson*, nine years before; and by the *same four Judges*[2] who decided the case of the *Queen* v. *Murray* only two years before, on both of which occasions the maxim of "the four seas" was *specifically mentioned* as the ground upon which those judgments proceeded.

The old Law was, nevertheless, considered to have been shaken by the case of *St. George* and *St. Margaret*; and on the very next occasion when the matter was brought before the Courts, namely, in the case of *St. Andrew*'s and *St. Bride*'s in 1717, at which time Lord Holt and all the Judges (except one)[3], who had decided the cases of *Rex* v. *Albertson*, *Queen* v. *Murray*, and *St. George* v. *St. Margaret*'s were *dead*, the Court took no notice of the rule of the *quatuor maria*, and adjudged the children of a married woman to be bastards upon very strong and almost conclusive proof that her husband had not had access to her for seventeen years, though he remained during that time in England.

After this period a change took place in the strict *letter*, but not in the *spirit* of the Law of Legitimacy; for the policy of the Law remained the same. The rule that the husband was the father of his wife's child, if he was within the realm at the time when it was con-

[1] Chief Justice Holt, Sir Lyttleton Powys, and Sir Henry Gould.

[2] Chief Justice Holt, Sir Lyttleton Powys, Sir Henry Gould, and Mr. Justice Powell.

[3] Sir Lyttleton Powys.

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ceived, proceeded upon the *possibility* of his having had access to her, as well as upon the *presumption* that in the majority of instances, that will happen which is consonant with the dictates of nature. It supposed that the desire for sexual intercourse between two persons, to whom divine and human laws alike sanctioned the indulgence, would always be so strong as to overcome every barrier, except such as distance, compulsory separation, or bodily infirmity should impose. Nor has the experience of ages manifested the incorrectness of such an hypothesis ; but it must also be said, that this presumption of Law is founded on a higher principle than mere sexual inclination. The Law supposes that a man usually performs whatever duties he may have solemnly and deliberately undertaken. The primary duty of a husband is cohabitation ; but it is also his duty to exercise a tender watchfulness over the conduct of his wife. If a husband justifies the expectations of the Law by fulfilling his marital duties, his wife will seldom violate that peculiar virtue of her sex, which undoubtedly led to to the legal principle of fixing the paternity upon the husband. When, however, neither affection nor duty has any influence, and a husband becomes indifferent to his wife's chastity, and to his own honour, the cause of morality is essentially promoted by a Law which makes it his *interest* to preserve her from crime, by visiting him with the consequences of her misconduct.

The old Law seems therefore to have been based upon a profound knowledge of human nature ; but it laid down an iron rule, which was occasionally revolting to common sense. The object of the Courts, in innovating upon the ancient Law, was to reconcile Law with Reason :—to preserve the principle, but to modify its application in such cases as admitted of the same *certainty* with respect to

the fact. Thus the old Law fixed the paternity upon the husband, except in cases of moral or physical *impossibility*; in other words, whenever it was *certain* that the husband *could not* have had nuptial intercourse with his wife. But this *impossibility* was as *certain*, if the husband and wife had been closely shut up in separate prisons, as if the four seas, or the Atlantic Ocean had divided them. So also in other cases of undoubted separation, and in a few instances, perhaps, of peculiar bodily afflictions in either party, whether separated or not. It is not surprising that the rude but strong common sense of our ancestors, abhorring litigation, and desirous of laying down broad and intelligible rules of Law, should have preferred a positive geographical limit, within which access was always to be presumed, to leaving the question of access, when it was *probable* or *possible*, to the discrimination of a jury. But it was the natural consequence of advanced civilization to break through a rule which sometimes involved absurdities and injustice.

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The first deviation from the maxim of "the four seas" was therefore to receive evidence of *impossibility* of access, *from whatever cause* such *impossibility* might arise. In *Pendrell*'s case, in 1732, when it was first conceded that the rule of the "quatuor maria" was abandoned, the parties were *separated* by considerable distance, and the question was, not whether the husband had or had not had nuptial intercourse, but whether he had not been in London, where his wife resided during the year immediately before the infant was born; for it was not denied that if he had been in a situation which rendered sexual intercourse *possible*, its occurrence must be inferred. As however the jury were convinced that he had not been in London, by the testimony of persons by whom, in consequence of his state of health, he had been constantly

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watched, his residence at a distance from his wife when she became pregnant was established[1], and hence it became a matter of *certainty* that he could not by any *possibility* have begotten the child. In the case of *Lomax* and *Holmeden*, in the same year, 1732, the Court again rejected evidence of *probability*, and required evidence of *impossibility*; and it presumed that nuptial intercourse had taken place solely because the husband and wife had both resided in London[2]. Upon[3] *Corbyn*'s case nothing will be said, because it is not reported, and all the facts of it are not known[4]. In the case of the *King* and *Bedale*, in 1737, the Court of King's Bench confirmed an order of two Justices, who considered that the issue of a woman, whose husband was stated upon evidence[5] not to have had access to her for seven years and nine months, were bastards, which, if the witnesses were credited, was also a case of *impossibility*. In the case of the *King* and *Lubbenham*, in 1791, the husband went abroad, and five years afterwards his wife, supposing him to be dead, married again and had a child; but twelve months after its birth her first husband returned. The child was adjudged a bastard, it being *impossible* for the first, and in fact *only* husband, to have been its father; and as he was *extra quatuor maria* when it was begotten, its status would have been so determined under the old Law.

The first occasion on which proof of *impossibility* of the husband being the father was not insisted upon, and when the Law was still further relaxed by receiving evidence which *tended to the same conclusion*; or to speak more correctly, when the question of legitimacy depended

[1] p. 129, antea. [2] pp. 131, 132, antea.

[3] In *The King* and *Reading*, in 1734, which was the next in point of time, the illegitimacy of the children was only shown by the declaration of their mother, which was held to be insufficient. So also in *The King* v. *Rook*, in 1752.

[4] p. 133, antea. [5] pp. 134, 135, 136, antea.

upon strong *improbability*, was in the case of *Goodright* and *Saul*, in 1791. The husband had separated from his wife, and quitted Norwich, in which city she continued to reside. She afterwards lived publicly in adultery with another man for many years, by whom she had a son. It was proved that the child was always considered by her family as a bastard, and had borne the name of his real father. *Proof of the husband's absence from his wife could not be given*; but, on the other hand, *so far from there being proof of his having resided near her*, it was sworn by an old witness that he was supposed to have gone to London. The plaintiff claimed as the descendant of the son of the adulterous connexion, contending that the parties had been married; but finding the evidence against him to be irresistible, *he then claimed as heir to the son of the husband*, upon the ground that non-access to his wife had not been proved. In this view the Judge agreed, and the jury returned a verdict accordingly; but upon an application to the Court of King's Bench, a new trial was granted, the Judge who originally tried the cause being persuaded that he had laid too much stress upon the necessity of *proving non-access* [1].

General Remarks.

In the case of *Smyth* and *Chamberlayne*, in the Court of Arches, in 1792, the principle of the old Law, that sexual intercourse must be inferred, when, from the residence of the parties, access was *possible*, prevailed against the strongest circumstantial evidence that the husband was not the author of the child's existence. The parties had separated, and the adulterous connexion was indisputable; but because the husband lived in London, and the wife sometimes at one extremity of the metropolis and sometimes at Hammersmith, (she being the avowed mistress of a nobleman), and because they had had occa-

[1] p. 113, antea.

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sional interviews for the payment of money, though such interviews did not take place within a considerable period of the child's birth, the Court held that he was the son of the husband, notwithstanding it was proved that he had connived at her intercourse with her paramour, that he had never recognised the child as his own, though such a recognition would have been attended with pecuniary advantages to him, and that in a certain legal transaction, he had acted himself, and allowed the Court of Chancery to act, as if the child was not, in any way, related to him, inasmuch as he stated in his answer to a Bill in Chancery, after his wife's death, that "he did not know who was her heir at law.[1]" In this case the Judge proceeded upon the necessity of proving the *impossibility of access*, and upon its being the presumption of Law that access does always take place if the parties lived in the same town, *unless it could be proved by persons who had watched them that they had never come together*; and that *if direct evidence can be given that they had access to each other, the child is legitimate, notwithstanding any circumstantial evidence to the contrary*[2]. This judgment was at variance with the proceedings of the Court of King's Bench in the case of *Goodright* and *Saul*; and the ill effect of innovating upon the principles of Law which had until then prevailed, becomes for the first time apparent.

Precisely the same principle as was laid down in *Smyth* and *Chamberlayne* governed the Court of Session in Scotland in deciding the case of *Routledge* and *Carruthers*, in 1806. Little doubt existed that the husband was not the real father of the child, but there was "no *physical impossibility* from distance or otherwise[3];" and *impossibility* was stated in the strongest language by all the Judges on that occasion to be *indispensable*. Their judgment was confirmed upon appeal by the House of

[1] p. 153. [2] pp. 150, 151, 152, antea. [3] pp. 158–162.

Lords in 1816, when Lord Chancellor Eldon said he concurred with all the Judges in the Court below. General Remarks.

The next case[1], that of the *King* and *Luffe*, in 1807, was one of plain *physical impossibility*, the husband having been beyond the seas until fifteen days before the child was born; and it is remarkable for the unqualified manner in which Lord Chief Justice Ellenborough and the other Judges of the King's Bench laid down the Law on the subject. Lord Ellenborough insisted upon the necessity of evidence "to show the *absolute physical impossibility* of the husband's being the father," and stated, that *improbability, however strong,* was insufficient to rebut the presumption of legitimacy, which general presumption will prevail except a case of *plain natural impossibility* be shown[2]. The same rule of requiring proof of impossibility was observed in *Boughton* v. *Boughton*, in the same year, when the strongest presumptive evidence that the child was begotten by a gentleman who lived in adultery with the mother, (she being his mistress, and he having adopted and brought up the infant as his own) was rebutted by no *other proof than that the husband was alive*; and a jury returned a verdict in favour of the legitimacy[3]. Again, in the case of *Lloyd*, where the husband was a lunatic and in ill health, and where it was proved that the wife had slept with another man at the time when the issue was supposed to have been begotten[4]. The case of the *King* and *Maidstone*, in 1810, which is the next of the series, closely resembled that of *The King* and *Luffe*, it being also one of physical *impossibility*[5].

In the ensuing year, the claim to the Earldom of Banbury came before the House of Lords, the importance of which, as to the Law of Adulterine Bastardy, justifies the

[1] Except that of *Shelley*, in 1806 (*vide* p. 247, antea), which presents no fact deserving of particular attention in this place.

[2] pp. 172–177, antea.

[3] pp. 178, 179, antea.

[4] pp. 180, 181, antea.

[5] p 180, antea.

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elaborate Report of that case which will be found in the following sheets; and renders it proper to submit some observations upon it in this place.

The remarkable facts in the proceedings on the Banbury claim in 1813, were, that some of the most eminent lawyers of the day, namely, Lords Eldon, Ellenborough, and Redesdale, denied the accuracy of Lord Coke's exposition of the Law, notwithstanding that it was founded upon the whole series of authorities and cases for many centuries, and continued to be received in all the Courts as undoubted Law, until the early part of the eighteenth century; and that although the principle of the old Law was admitted to be well founded, a mode of arriving at the same conclusion was sanctioned, which had the effect of shaking the principle itself.

The spirit of all former decisions (with the exception perhaps of *Goodright* v. *Saul*) was to *exclude* the *possibility* of the husband's being the father, before the child of the wife could be bastardized, for which purpose the only admissible evidence was *direct* and *conclusive proof of the impossibility of access.* In the *Banbury* case, however, *inferences* from *circumstantial* evidence were considered sufficient; and it was said that the presumption of legitimacy might be rebutted, not only by *direct* and *conclusive* evidence which negatived the *possibility of sexual intercourse having taken place,* but by *circumstances* which might convince those who had to decide the question that it did not take place. Doubts having arisen on the points of Law in the case, it was determined to ask the opinions of the Judges; and it is equally difficult to reconcile the whole of the answers of those learned persons with previous decisions and authorities, and to discover that the judgment of the House coincided with the opinions which were then given by the Judges for its assistance and guidance.

General Remarks.

The Judges stated in effect:

I. That the presumption of legitimacy might be rebutted by circumstances inducing a contrary presumption, notwithstanding the parents were both capable of procreation, and had opportunities of access at the period when the child was begotten [1].

The reasons for this opinion, though stated to the House, are not recorded in the Minutes of the Committee; and unless it proceeded upon the erroneous construction which has been heretofore given to *Foxcroft*'s case, or upon the supposition of a sentence of divorce, the authorities upon which it was founded remain to be ascertained.

II. The Judges considered the fact of the birth of a child of a married woman to be generally *primâ facie* evidence that it was legitimate; that whenever there was *primâ facie* evidence of legitimacy, the *onus probandi* to the contrary, rested with those who disputed it; that such *primâ facie* evidence might always be rebutted by satisfactory evidence that the husband had not had sexual intercourse with his wife, at a time when, if he had had such intercourse, he might have begotten the child; and that *non-generating access*, from whatever cause it might arise, might always be proved by evidence, which, by the Law of England, was admissible to prove a physical fact [2].

The Judges seem, therefore, in their opinions on the *Banbury* case, to have confined the evidence of illegitimacy of children born in wedlock to conclusive *proof* that *nuptial intercourse did not take place*; and they added, that if it could be proved that the husband had had sexual intercourse with his wife, no evidence could be received, except it tended to falsify the proof that such intercourse had taken place [3].

[1] p. 181, antea. [2] p. 182, antea. [3] p. 183, antea.

General Remarks.

These opinions were far from settling all the legal points which were raised; and by expressly giving to the term "access" the meaning of "sexual intercourse[1]," instead of presuming nuptial intercourse always to have occurred, whenever the husband had such personal "access" to his wife, as admitted of the *possibility* of sexual intercourse, it became necessary to submit other questions to them[2].

The Judges stated, in reply to the additional questions put to them, that sexual intercourse is presumed to have taken place between husband and wife, until that presumption is encountered by such evidence *as proves to the satisfaction of those who are to decide the question*, that it did not take place, at a time necessary for the child to be the fruit of that intercourse. They repeated that the legitimacy of a child born in wedlock could only be resisted by evidence that sexual intercourse had not taken place between the husband and wife, and that "non-access" was generally understood to mean the non-existence of sexual intercourse[3].

According to these opinions, the existence of sexual intercourse between man and wife might be disproved, like any other fact, by whatever evidence a jury may consider sufficient for the purpose. In this view of the subject, Lords Eldon, Ellenborough, and Redesdale fully agreed, but its correctness was denied by Lord Erskine; and the *Banbury* case was adjudged upon the supposition, that the circumstantial evidence produced against the claimant, was sufficient to prove that William Earl of Banbury did not have sexual intercourse with his Countess at a time when it was possible for him to have been the father of either of the two children, Edward or Nicholas, the latter of whom was the claimant's ancestor.

Supposing the Law in 1813 to have been as the Judges stated it, the importance of the *Banbury* case as a prece-

[1] p. 183. [2] *Ibid.* [3] p. 184.

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dent depends upon the nature of the evidence which was then considered sufficient to rebut the presumption of legitimacy, and upon the particular circumstances under which the issue of a married woman was considered illegitimate. Before adverting to those points, it is material to inquire,

1. Whether the Law as it was laid down in 1813 was the same as it was in the year 1631?

2. Whether the justice of the Banbury case did not require that the legal status of the claimant's ancestor should have been determined by the Law when he was born, and not as it was expounded nearly a century afterwards?

Upon the first point little will be said. The noble Lords who were opposed to the claim denied that the Law in 1631, or in 1661, when the claim was first brought before the House of Lords, was such as Lord Coke had stated it, and as the Attorney-general admitted it to have been. A reference to the preceding pages will probably enable the profession to determine whether the eminent lawyers who have been cited, including nearly all the Judges of ancient times, and, in more modern periods, Lord Chancellors Ellesmere and Nottingham, Lord Chief Justices Coke, Montague, Hobart, Rolle and Holt; Justice Blackstone[1]; and Attorney-Generals Sir Geoffrey Palmer and Sir William Jones; as well as *all the writers on the Laws of England without a single exception,* were likely to have been ignorant of the Law upon which every man's birthright was founded, and which, as was happily said by Lord President Blair[2], formed "the corner stone, the very foundation, on which rests the whole fabric of human society."? To the profound learning and invaluable labours of these sages of the English Law, whose knowledge on

[1] Commentaries, Vol. I. p. 156. [2] p. 161, antea.

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this important subject has been recently impeached, their successors have paid grateful homage; and it is therefore difficult to suppose, that they did not know the Law which they administered, and on which many of them wrote those learned Treatises that are still the text books of the science, at least as well as Judges who lived more than a century afterwards. The feeling is, it is hoped, pardonable which clings with affecionate veneration to these illustrious names; which desires to vindicate their legal fame from the imputation of error; and which repels with indignation the charge brought against the most distinguished Jurist of our country, in reference to this subject, that he sometimes had recourse to "*untruths*" to support his opinions.[1] Their justification does not however depend upon the efforts of any individual. It will be found in the authorities and cases to which they referred, which have now been collected, and which, it is presumed, fully establish the correctness of their statements.

With respect to the second point, it would seem to have been acknowledged that the question in the *Banbury* case turned upon the status of the claimant's ancestor, according to the Law at the period when he lived: "Your Lordships," said Lord Eldon, "must place yourselves as if you stood in this House in 1661[2];" and great pains were therefore taken by that noble Lord, as well as by Lords Ellenborough and Redesdale, to show that Lord Coke's definition of the Law was erroneous. If then the claim depended upon what was held to be Law in 1631, instead of upon the Law in 1813, and if it be admitted that the Law in 1661 was, what all the lawyers, not only of that day, but of preceding and subsequent periods, have uniformly, and without even a solitary exception, stated it to have been, as well in their

[1] *Vide* p. 461, postea. [2] *Vide* p. 515, postea.

writings as from the Bench, it does appear inconsistent with justice to have adjudicated the *Banbury* case, by any other rule of Law, than that which existed when the party whose legitimacy was in dispute was born, and which created his legal status. General Remarks.

Not a shadow of doubt can be entertained of the claimant's right, if the Law was such as it is described by Lord Coke, and by all earlier and contemporary authorities; but supposing that it was just and proper to determine the question by the Law as it was laid down in 1813, it remains to be shown, that the evidence which rebutted the presumption of legitimacy would have been even then considered sufficient for that purpose in the Courts of Common Law.

The decision was grounded upon the presumption that the Earl of Banbury had not had sexual intercourse with his wife in such parts of the years 1626 or 1630, as rendered it possible for him to have been the father of Lady Banbury's two children, the eldest of which was born in April 1627, and the other, the claimant's ancestor, in January 1631.

As it was admitted that Lord Banbury's advanced age formed no objection, the evidence against the legitimacy consisted of a series of facts arising from the conduct of Lord Banbury, of Lady Banbury, and of her second husband, Lord Vaux, which, it was said, tended to raise the irresistible inference that Lord Banbury was not the real father of her children, and which inference was supported by the finding of a jury after his death. Notwithstanding the maxim of Law that the presumption is always in favour of legitimacy[1], and that every one of those facts was, as has been attempted to be shown in the following sheets, susceptible of a construction *consistent with the legitimacy of the children*, only one view

[1] *Vide* pp. 70–73, antea.

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of them was taken by Lords Eldon, Ellenborough and Redesdale. The Inquisition which found that the Earl of Banbury died without issue was contradicted by a subsequent Inquisition, which found that the eldest of these children was his son and heir. There was direct evidence of the Earl and Countess having always lived together on terms of the greatest harmony and affection; of his having had access to her at times when, if sexual intercourse had taken place, he might have been the father of the children; of his being with her in a Court of Justice when she was so far advanced in pregnancy with the claimant's ancestor, that her appearance could not possibly have escaped his observation; of his never having suspected her of adultery, separated from her, or done any one act which did not evince the utmost confidence in, and affection for her[1]. Moreover, unless the witnesses who were examined in **1661** were guilty of *perjury*, for which suspicion there are no solid grounds, the ancestor of the claimant was "owned" by the Earl as his son.

Under such circumstances the legal presumption of legitimacy was never before, and has never since been, rebutted by any evidence whatever, except upon proof of the impotency of the husband. As the Bill which was brought in to render the claimant's ancestor illegitimate, never passed, the question remained in the same state until **1693**, when the House of Lords resolved that the then claimant had no right to the Earldom of Banbury, which resolution, formed after the House had rejected a motion for consulting the Judges on the points of Law, was subsequently declared illegal by the Court of King's Bench, in consequence of the House not having jurisdiction in the matter, because the case had not come before it on a reference from the Crown.

[1] *See* p. 382, postea.

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The presumption of Law in favour of the legitimacy of children born in wedlock, and the direct evidence that the Earl of Banbury might have had, and from his affection for, and his living with his wife, that he probably did occasionally have nuptial intercourse with her about the time when the children were begotten, was however allowed to be resisted by

1. *Supposed* ignorance on his part that he had issue.

2. A *supposed* adulterous connexion between his wife and his own intimate friend.

3. *Supposed* concealment of the children, because nothing was known of them during the first eight years after Lord Banbury's death, at the expiration of which period, the eldest was only fourteen, and the youngest ten years old.

In no previous instance, whether since or before the rule of the "quatuor maria" fell into desuetude, was the presumption of legitimacy ever rebutted except upon direct evidence that the husband was *separated from his wife*, that she had *lived openly and notoriously in adultery with another man*, and that the *residence of the husband was at some distance from that of his wife* when the child was begotten. From 1732 to 1813, the evidence had, in every instance, tended to exclude the *possibility* of the husband's being the father of the children, and his separation by distance from his wife when she became pregnant, was always proved, except in *Goodright* and *Saul*, but in that case it was so far from being shown that he lived near her, that evidence was given which induced a contrary inference. The mere *improbability* of a husband's being the real parent was rejected in the *strongest*, and most *unqualified* terms, upon each occasion; and even so late as in 1807, by Lord Ellenborough, in the *King* v. *Luffe*, who nevertheless considered the circum-

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stantial evidence against the legitimacy in the *Banbury* case as quite sufficient not merely to destroy the presumption of legitimacy, but to prove that several persons who had given evidence in support of that presumption when the original claimant was living, had committed wilful perjury.

The inferences which have been drawn from the conduct of the parties only raise a *suspicion* that Lord Vaux might have been the real father of the children; but that suspicion is supported by *no one fact*, whilst, on the other hand, all the circumstances upon which the illegitimacy of the children has been presumed, might equally have happened even if they had been *de facto* as well as *de jure* the issue of Lord Banbury. If he had publicly repudiated the children; or if it had been *proved* that he was ignorant of their existence; if he had separated from his wife; or if, like Lady Roos[1], and all the other married women whose children have been bastardized by Act of Parliament, she had been convicted of adultery, there would have been some grounds for giving to certain acts, the real motives of which cannot now be ascertained or explained, the construction which they have received[2].

In the preceding remarks, the *correctness* of the *facts* in the *Banbury* case, as stated by Lords Eldon, Ellenborough, and Redesdale, and upon which the resolution against the claimant was founded, have been admitted; but the notes appended to the speeches of those learned Lords will show that their Lordships were mistaken on many material points. To these misconceptions it is necessary to allude, because they increase the doubt which the profession have entertained, of the propriety of that decision, and therefore tend still further to weaken the value of the *Banbury* case, as a *precedent*.

[1] *Vide* pp. 87, 88, antea.

[2] *See* the forcible and eloquent observations of Sir Samuel Romilly on this subject, p. 448, postea.

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With respect to the Law on the subject, it was taken for granted that *Foxcroft*'s case formed an early precedent for declaring a child illegitimate, notwithstanding the coverture and cohabitation of its mother and ostensible father, he not being either impotent or absent from the realm, whereas that case turned entirely *upon the invalidity of the marriage*. The statements of Lord Coke were declared not to have been Law, whereas it is indisputable that his definition was considered by his contemporaries, as well as by previous and succeeding Judges, until nearly a century after his death, to have been sound Law.

In matters of Fact, the House of Lords were mistaken respecting the date of the birth of the claimant's ancestor, from which error it was supposed that he was living when the Earl of Banbury made his will, whereas he was not then born. There are strong reasons for believing that the Countess of Banbury was supposed to have been three years older than she actually was when she gave birth to the children. It was assumed that the marriage-bed of the Earl and Countess had been previously barren, and great stress was laid upon the improbability of a woman becoming, for the first time, pregnant by her husband when he was upwards of eighty, after a cohabitation of more than twenty years; whereas it has since been discovered that she had before had a child, if not children. One of the most stringent points against the claimant was, that no suit had ever been instituted to recover the estate of Rotherfield Greys, which could not, it was said, have been alienated from the heirs male of the Earl's body; but it has been shown that, according to the opinion which then prevailed, that estate could be legally alienated.

As the evidence upon which the House of Lords decided that the claimant's ancestor was illegitimate was entirely circumstantial, the misconceptions alluded to had a serious effect; and it is not impossible that, if they had

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been then detected, the House might not have arrived at a conclusion which has been truly described as being "contrary to every dictum of Law, and to every decided "case from the time of Edward the Third downwards[1]."

It has been said that the *Banbury* case has, "by over-ruling all former decisions, admitted a new principle, which has entirely altered the Law of Adulterine Bastardy[2];" but the correctness of the remark is by no means certain, because there has not been any case in which the new principle has been acted upon, and because the opinion of the Judges on that occasion did not sanction the innovation which that decision, if admitted as a precedent, is calculated to produce.

The judgment of the House of Lords on the claim to the Earldom of Banbury appears to have been received by the profession with much dissatisfaction; and it has had but slight influence on subsequent proceedings in Courts of Law. Lord Erskine, whose address in support of the claimant was alike distinguished by splendid eloquence and profound views of the principle which the question involved, wrote to the claimant, that the Protest against the Resolution had given the opponents of the claim "every fact and all their arguments, but giving them both, *leaves them without a single voice in Westminster Hall, from one end to the other.*"

Three years after the Banbury claim was rejected, the case of *Routledge* and *Carruthers*, in which the legitimacy of the claimant's ancestor depended almost entirely

[1] *Edinburgh Review*, March 1829, vol. XCVII. p. 204. The writer of the article alluded to proceeds to say, "The solitary instance which Lord Ellenborough relies upon (*Foxcroft*'s case, which occurred in the 10th of Edward the First), was tried at the time the Courts were governed by the doctrines of the Civil and Canon Law;" but it has since been discovered that *Foxcroft*'s case was not at variance with subsequent decisions and authorities. It is then justly observed, that "every other case which was cited as bearing upon this view of the question will be found, upon examination, to involve such circumstances of non-access as would satisfy any jury that the husband could not by possibility have been the father of the child." —*Ibid.*

[2] *Ibid.*

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upon the *presumption of law* in favour of children born in wedlock, came before the House of Lords upon appeal. All the Judges of the Court of Session insisted upon the necessity of evidence of the *total impossibility* of the husband's being the father, though it was admitted that the wife had been frequently guilty of adultery, and that there was the strongest probability that her husband was absent when the infant was begotten. But notwithstanding the precedent of the *Banbury* case, in which neither an adulterous intercourse nor a separation was proved, Lord Eldon declared that he concurred with all the Judges below, and confirmed their judgment[1].

In the next case of that nature which came before the Courts, *Head* v. *Head*, in 1823, the principles which governed the *Banbury* decision were so far from being adopted by the Vice-Chancellor, (Sir John Leach), that like Lord Ellenborough, in the *King* v. *Luffe*, he stated that the "ancient policy of the Law of England remains unaltered;" that though the rule of the "*quatuor maria*" was exploded, the evidence must be of a character to *exclude all doubt*; that the deduction to be drawn from the opinions of the Judges in the *Banbury* case was, that whenever a husband and wife are proved to have been together at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was *primâ facie* to be presumed; and that it could only be disproved to have taken place, by *evidence of circumstances* which afford *irresistible presumption* that it *could not* have taken place, and *not* by *mere evidence of circumstances* which *might afford a balance* of *probabilities* against the fact. Lord

[1] *Vide* pp. 153–155.

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Eldon, before whom the case of *Head* v. *Head* came upon appeal, agreed with the Vice-Chancellor, and also adverted to the opinions of the Judges on the *Banbury* claim. His Lordship said that he understood the Judges to have drawn a distinction between *personal access* of the husband to his wife, and *nuptial intercourse*; that wherever the former existed, the latter was to be presumed, which presumption must stand until it is repelled by "clear and satisfactory evidence" that there had not been sexual intercourse. In addressing himself to the character of the evidence by which such presumption could be repelled, the learned Lord seems to have stated of what it *might* consist rather than to have explained its exact nature; but he said, that in admitting evidence for that purpose "great care must be taken, regard being had to this, that the evidence is received *under a Law* which *respects* and *protects legitimacy*, and *does not admit any alteration of the 'status et conditio' of any person except upon the most clear and satisfactory evidence.*[1]"

If the legal principles which were thus admitted to be in full force ten years after the Banbury claim, be applied to that case, in what manner can they be possibly reconciled with the decision? Will it be said that there was "*clear* and *satisfactory evidence*," or evidence which "*excluded all doubt*," that Lord Banbury did not have sexual intercourse with his wife in 1630,—in which year he was proved to have been personally present with her in a court of justice, for the execution of an act which shows the great confidence he placed in her;—in which year he recorded his fondness for her, and gave testimony to her virtues in the most solemn instrument a man can execute, his Will;—in which year, and about which very time, she became pregnant with the claimant's ancestor? Against such facts, can any circumstantial evidence,

[1] pp. 207, 208.

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much less circumstantial evidence which is susceptible of a construction consistent with the legitimacy, be considered sufficiently "*clear* and *satisfactory*" to overcome "a Law which *respects* and *protects legitimacy*"? Will it be pretended that all the evidence produced in the *Banbury* case, accumulated and pressed as it was to support one view of the subject, amounted to more than a strong "*probability?*" and "*probabilities,*" however strong, had never before been admitted as evidence to rebut the presumption that a husband had had sexual connexion with his wife. Though *probabilities* in these matters seem to have been countenanced by the House of Lords in the Banbury claim, under the specious character of raising a *presumption amounting to impossibility,* they have since been as rigidly rejected, as they were by Lord Ellenborough and the other Judges, in the *King* and *Luffe.* Sir John Leach's opinion, in *Head* and *Head,* was repeated with additional force, in *Bury* and *Philpott,* so lately as 1834. "*Access,*" said that learned Judge, "is *such access* as *affords* an *opportunity* of *sexual intercourse*[1], and *where the fact of such access between a husband and wife,* within a period capable of raising the legal inference as to the legitimacy of an after-born child, *is not disputed, probabilities can have no weight,* and a case ought never to be sent to a jury. There is *nothing against the evidence of access, except evidence of the adulterous intercourse* of the *wife, which does not affect the legal inference*; for *if it were proved that she slept every night with her paramour* from the period of *her separation* from her husband, I must still declare the children to be legitimate[2]."

[1] In the case of *Clarke* and *Maynard,* in 1822, Sir John Leach said, that "access is not to be presumed because the parties were within such distance that access was possible."—*Vide* p. 248, antea.

[2] *Vide* p. 245, antea.

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In what manner can this dictum be made to agree with the *Banbury* decision? The access of Lord Banbury to his wife, when, if he had sexual intercourse with her, he might have been the father of the claimant's ancestor, was not disputed; the parties were not separated; nor was there any evidence of an adulterous intercourse. What then prevailed against the legal inference of legitimacy, unless it were certain facts, which, in the minds of those who rejected the claim, amounted to a "*probability*" that he was not begotten by the husband?

It is remarkable that every case since the Banbury decision (except perhaps that of *Morris* and *Davis*) has been decided upon the rule of Law which *excluded* the "*possibility*" of the husband's being the father. *Probabilities* have been always *rejected*; and it would therefore seem that the precedent which the *Banbury* case affords for allowing a child born in wedlock to be bastardized by evidence of so inconclusive a nature as was then considered sufficient for the purpose, has never been followed.

The only case which has not been noticed in the preceding summary, is the important one of *Morris* and *Davis*; but as it is again to be brought forward, it would be improper to do more than advert to the principles of Law which were laid down in the various judgments that have been given on it.

The ground upon which the plaintiff claimed to be legitimate was, that notwithstanding the wife was parted from her husband by a deed of separation, he occasionally visited her, and that he *undoubtedly had opportunities of sexual intercourse*; and it was contended that that fact raised the legal presumption in favour of legitimacy, against which no other circumstance whatever ought to prevail, unless the husband was impotent, which was not pretended[1]. On the first trial the jury returned a

[1] p. 218, antea.

verdict for the plaintiff[1]; but a new trial being moved for, Lord Chancellor Lyndhurst said, in 1827, that in his opinion, after all that had taken place on the subject, no doubt could be entertained with respect to the rule of Law applicable to cases of this nature; that "it was perfectly clear that when a husband and wife were not separated by a sentence of divorce, *à mensâ et thoro*, the Law will *presume* sexual intercourse, unless the *contrary be proved*; that to repel this presumption of Law the evidence must be *clear* and *satisfactory* to the minds of those who are to decide upon the question, and that light presumptions will not be sufficient"[2]. After noticing the opinions given by the Judges in the *Banbury* Peerage, his Lordship added; "therefore evidence arising from circumstances may be sufficient to repel the presumption, provided the inference to be drawn from that evidence be clear and satisfactory." Upon the question, "whether the inference arising from the *conduct of the parties* may be sufficient to rebut the presumption of Law," he said, "undoubtedly the evidence arising from the conduct of the parties may be *most material* and *important*; but whether such evidence *alone* would be *sufficient* to rebut the presumption, is unnecessary in this case to determine. In the case of the *Banbury* Peerage, the conduct of the parties, and the evidence thence arising, formed a principal ground of the judgment of the House of Lords"[3].

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It would appear from these expressions that Lord Lyndhurst was not prepared to admit that the conduct of the parties was of itself sufficient to rebut the legal presumption of sexual intercourse; and though his Lordship cited the *Banbury* case, in which the conduct of the parties and the evidence thence arising formed a principal (it might have been said the *only*) ground

[1] *Vide* pp. 225, 227, antea. [2] p. 220, antea. [3] p. 221, antea.

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of the judgment of the House of Lords, he gave no opinion on the propriety of that decision.

On the second trial, before Mr. Baron Vaughan, the jury did not credit a witness who, on the former trial, had sworn that the parties had slept in the same house in the spring of the year preceding that in which the plaintiff was born, but additional proof was given of there having been such access in that year as admitted of the possibility, if not probability, that sexual intercourse did take place. The jury however found against the legitimacy; but as the verdict did not satisfy the learned Judge, (who told the Lord Chancellor that if he had been upon the jury he should have found a different verdict,) a *third trial* was ordered [1].

The three witnesses who had proved access on the former occasions were not produced on the third trial, and no additional evidence upon that point was given. Mr. Justice Gazelee who tried the cause [2], told the jury that "the *Banbury* Peerage was now the Law; that in this case there was *primâ facie* evidence of intercourse, but that it was competent to rebut that presumption by any thing that amounted to satisfactory evidence that no intercourse took place;" that the jury had to determine whether sexual intercourse might have taken place, and if so, whether the evidence satisfied them that it did not take place; that if it might have taken place, the Law presumed it did, unless the contrary were proved; that many witnesses had proved opportunities; and *if the jury were satisfied there were opportunities, the Law says the child is the child of the husband* [3]. The jury being unable to come to a decision, they were discharged without giving a verdict.

Though the Judge admitted on that occasion, that the

[1] p. 228.

[2] Mr. Justice Gazelee was one of the counsel for the claimant of the Earldom of Banbury in 1813.

[3] p. 229.

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Banbury Peerage is now the Law, he could only have referred to the *opinions* which were given in that case by the learned Judges, because his directions to the jury were at variance with the *principles of Law* which the *Banbury* case itself, if received as a precedent, would have established. According to Mr. Justice Gazelee's dictum, which agreed with that of the most learned of his predecessors, if the jury were satisfied that there had been opportunities of sexual intercourse, the Law says, the child is the child of the husband; but in the *Banbury* case, *opportunities* were *proved,* and the inference arising from those opportunities, that there had been sexual intercourse, was strengthened by the affection and harmony which then and always subsisted between the parties, and by there being no evidence that the wife had committed adultery, or even been separated from her husband.

In 1830, when the case of *Morris* and *Davis* came before the Court of Chancery, for Lord Lyndhurst's decision, he again alluded to the opinion of the Judges in the *Banbury* Peerage, which, he said, he did not consider to have laid down any *new* doctrine, but as having arisen out of, and been founded upon the previous decisions; that the judgment of Sir John Leach, in *Head* and *Head,* so far from affecting the opinion of the Judges, had recognised and adopted that opinion; that the evidence of there not having been sexual intercourse must *not be* that of a *mere balance of probabilities,* but be such as to *exclude all doubt,* that is, his Lordship added, "of course, all reasonable doubt, in the minds of the Court or jury to whom the question is submitted"[1]. Lord Lyndhurst then cited Lord Redesdale's observations on the Law of Legitimacy in the *Banbury* case, and the view which was then taken of

[1] pp. 234, 235, antea.

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the subject by Lords Ellenborough and Eldon; and he observed, that *no lawyer will now contend* that Lord Erskine's opinion on that occasion, *that it was necessary to prove the actual impossibility of sexual intercourse having taken place,* can be sustained[1]. As Lord Lyndhurst considered that there was sufficient evidence in the case before him, that the husband was not the father of the plaintiff, "not," he said, "upon a bare balance of probabilities, but as the result of the thorough conviction of his mind, founded upon a careful and patient attention to all the evidence," he pronounced against the plaintiff's legitimacy[2].

The Law of Adulterine Bastardy has thus, it appears, undergone two important changes, without the intervention of any Act of the Legislature; and the principle of "*certainty,*" upon which it formerly proceeded, and which the great lawyers of past ages considered it sound wisdom to uphold, no longer exists. Until the year **1717**, that principle was so rigidly acted upon, that a child born in wedlock could not be bastardized, unless the parties were separated by a sentence of divorce, by evidence of the husband's *impotency,* or of his *absence from the realm,* when it was begotten. But as reason and common sense showed that it might be as *impossible* physically and morally, in many cases for the husband to have begotten the child as if he had been beyond the seas, the maxim of the "quatuor maria," fell into desuetude. Had the alteration rested here, and had the Courts continued to demand *conclusive* and *irresistible evidence* of the *impossibility* of the husband's being the father, and always presumed sexual intercourse to have taken place, whenever the local situation of the

[1] pp. 237, 238, antea.
[2] pp. 241, 242, antea.

parties rendered it possible[1], the confusion and contradiction which have since prevailed would have been avoided. General Remarks.

The next and most important innovation was to allow the presumption of sexual intercourse to be rebutted by whatever evidence a Court or Jury may consider sufficient to prove that it did not take place, at a time when, if it had occurred, the person whose status is in dispute, might have been the fruit of such intercourse; and which, to judge from recent decisions, is *now the Law on the subject.*

It has been said that the last alteration in the Law of Adulterine Bastardy was caused by the decision of the claim to the *Banbury* Peerage[2]; but there does not appear to be any instance in which that case has been made a precedent, and Lord Lyndhurst considered the opinion of the Judges on that occasion to have laid down no new principle. There cannot, however, be a doubt that the tendency of the *Banbury* decision is still further to relax the ancient principle of requiring the most conclusive evidence of *impossibility,* before the legal *presumption* of sexual intercourse having taken place between married persons can be destroyed; and some observations will be submitted with the view of showing the inexpediency of deviating in the slightest degree from the Law as it was admirably laid down by Lord Ellenborough in the *King* and *Luffe,* an exposition which alike avoided the occasional absurdity that attended the rule of the "quatuor maria," and the danger and confusion which must arise from admitting *probabilities* of any kind, and of any degree of strength, into questions of this nature.

In matters which depend entirely upon the feelings, the experience of ages, and the legal principles which

[1] See the cases of *Smythe* and *Chamberlain,* in 1792, and *Routledge* and *Carruthers,* in 1806.

[2] *Edinburgh Review,* vol. XCVII. p. 204.

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that experience may have produced, can rarely be neglected with safety. Human nature varies little; and the difference is in no instance less perceptible, than in the motives and actions which arise from, or which are connected with passions common to all. For these reasons, the Law of Legitimacy which has prevailed for centuries in every civilized country of Europe, must be supposed to be based upon a profound knowledge of mankind. However much Jurists may have differed upon other points, they have agreed in considering that the interests of society were best promoted by making legitimacy the necessary and unquestionable consequence of marriage. Greatly as they may have relied upon human sagacity on many subjects, upon this they have always distrusted it; and it has been therefore the policy of all legislators to render a question of so much delicacy and uncertainty, which involves in its decision the pure fame of one of the parties, the inheritance of the other, and probably the happiness of both, which may cause the son to look upon his mother as the author of his shame, and thus break asunder the most beautiful moral tie by which society is united, dependent not upon *opinions* or *inferences*, but upon *plain*, *definite*, and *substantive facts*. Hence have been derived the universal legal presumption in favour of legitimacy, the ancient rule of English Law, of "the four seas," and the principle of requiring evidence that it was actually *impossible* for the husband to have been the real father of his wife's offspring.

But the entire policy of a Law which has stood the test of ages, and received the suffrages of Jurists of all countries, becomes changed, if the legitimacy of a child born in wedlock can be shaken by any *presumptions* or *inferences* whatsoever, in cases where it was *possible* for the husband to have had sexual intercourse with its

mother at the time when it was engendered. By the Law as it is now understood, the *possibility*, not to say *probability*, of such intercourse, may give way to any circumstances which a Jury may think sufficient to prove that it did not take place. The effect of this alteration in the Law is to produce a state of inevitable confusion and contradiction, not only in the verdicts of Juries, but even in the rules laid down by Judges for their guidance. Of this remark the case of *Morris* and *Davis* is a striking illustration. Two Juries came to an immediately opposite conclusion upon nearly the same evidence; and a third Jury were unable to agree upon a verdict. The Law, as it was stated by one of the Judges, does not coincide with the opinion of the other, whilst the judgment of one of the most learned persons that ever presided in a court of justice, to whose decision the case was left for the purpose of avoiding the expense of a *fourth* trial, is to be the subject of an appeal to the House of Lords! Although Judges have in recent times occasionally differed in their views respecting the Law of Adulterine Bastardy, they have always agreed that the evidence must exclude "probabilities." Except in cases of physical incapacity or separation, the proof that a husband did not have nuptial intercourse with his wife, can rarely, if ever, consist of any other evidence than a variety of circumstances, which, when considered with relation to each other, and to the usual feelings that actuate mankind, may raise such a presumption; but the process of arriving at that conclusion is little else than to "*balance of probabilities.*"

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Let the entire series of cases of this kind from the earliest period until the *Banbury* decision be examined, and no precedent will be found of any cause having been the subject of *four* trials. It is therefore evident that such doubts and difficulties as have occasioned

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the multiplied trials of *Morris* and *Davis* were unknown so long as the Law required evidence of absolute *impossibility*; and until it shall have returned to the same intelligible rule, questions of suspected illegitimacy will only cease to be litigated when the parties interested in the result have exhausted their pecuniary resources. In the absence of one general and comprehensive principle, every case must be one of a special nature, and be more or less a matter of opinion; and perhaps in no other instance will the conclusions which different Judges and Juries may form upon similar evidence be so contradictory as upon the occurrence or non-occurrence of nuptial intercourse. A man and his wife may have quarrelled, or the incompatibility of their tempers may have caused them to separate, yet if they *could* have had, and *à fortiori*, if they *did* have access to each other, the probability that sexual connexion took place at those interviews, will depend more upon the temperament of the parties, the personal attractions of the woman, and the allurements which she may have employed, than upon any other circumstances whatever. Upon points like these what Court or Jury can ever possess accurate information? By what standard is the extent of sexual desire to be ascertained, which may induce one individual to forget his resentment or his wrongs, and to yield to the temptation of the moment, whilst by another the temptation is either resisted or unfelt? That which is highly probable in one man may be highly improbable in another, in consequence of the difference in their constitutions, or in their habits of moral restraint; and instances are not unknown, in which the accidental meeting of a husband with his wife, from whom he was separated on account of her infidelity, has caused him to yield to a sudden impulse of passion, in which all sense of duty and propriety was swept away. It has been

justly remarked, that whenever this has happened, it usually terminated the separation: but such is not the necessary consequence. Reflection and remorse are the immediate attendants on improper indulgence; and the original causes of the separation would re-appear in their true colours, as soon as the tumult of passion had subsided. Those only will deny the probability of this statement, who have never been exposed to temptation, or whose desires are happily of that cool and obedient character, as to be always subject to the dictates of reason.

If these observations be well-founded, they teach that there is no other certain principle, no other method of preventing litigation upon points which involve the most sacred feelings, as well as the property of society, than to adhere stedfastly and inflexibly to a rule which has been sanctioned by the wisdom and usages of centuries, of not allowing a child born in marriage to be bastardized, except upon *conclusive* and *irresistible evidence*, as a *matter* of *fact*, that the husband *could not by any possibility have begotten it.*

Against this argument it will be urged, that it is repugnant to the moral feelings to allow the fruits of an adulterous connexion to be clothed with the rights of legitimacy, and to succeed to the inheritance of an injured husband. Some observations upon this subject will be found in other parts of the volume; and it need only here be remarked, that it is a mistaken philosophy, and an Utopian view of society, which would make every question of law and morals dependent upon its own intrinsic merits, rather than upon general principles, or which imagines that any code of jurisprudence can be framed—that the utmost degree of perfectibility of which it is susceptible,—can provide for every individual wrong, or that it must not necessarily and inevit-

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ably consent to purchase extensive and important advantages, by tolerating, in occasional instances, moral injustice.

A few words must be added upon a suggestion which has been made for arriving at something like certainty in cases of disputed legitimacy. It has been proposed to make the *concealment* of the children of a married woman from her husband, the test of legitimacy, even in cases where proof of the adultery of the mother could not be given, because it is said that concealment to which the mother is a party, includes proof that the child is the offspring of an adulterous intercourse[1]. Before adducing reasons to show that this argument is not well founded, it is right to state it in its author's own words. After alluding to the *Banbury* case, and concluding that the decision that the claimant's ancestor was illegitimate was founded solely upon Lord Banbury's never having acknowledged the child[2], or admitted the paternity, by treating it as his son, the writer says, "It is the *con-*
"*cealment* which we would take as the test of illegiti-
"macy; and in our opinion it is unnecessary to say, 'con-
"cealment coupled with proof of adultery,' because we
"think concealment, *to which the mother is a party*, in-
"cludes proof that the child is the offspring of an adul-
"terous intercourse. For that a mother should, for any
"other reasons, conceal the birth of a child, appears so
"improbable, so utterly repugnant to all feelings of na-
"ture, and especially of woman's nature, that we may
"safely reject such a presumption as impossible. We
"must be careful, however, to distinguish between *con-*
"*cealment* and *non-recognition*. It is by no means impro-
"bable, that the husband, from jealousy or suspicion of

[1] *Edinburgh Review*, vol. XCVII. p. 207.

[2] The *Earl's recognition of the child* was *sworn to* by the witnesses, in 1661.

" his wife's infidelity, might be induced to repudiate, or " refuse to recognise and acknowledge the child as his " own. The fear of having a spurious offspring palmed " upon him, might make him act as if he believed he " had no issue at all; and therefore proof of adultery " and non-recognition are not alone sufficient to rebut " the presumption of legitimacy, provided there has been " a *possibility* of access. It must be proved that the " birth of the child has been *concealed* from the husband; " that it has been born and treated under circumstances " which clearly show that he was in total ignorance of its " existence; and if this be done to the satisfaction of a " jury, we conceive that they will be justified in pre- " suming that there has been no sexual intercourse be- " tween the husband and wife, the result of which could " be the birth of that child. This appears to us to be a " rule which may be safely applied to all those questions " of paternity which cannot be determined by proof of " impotence, or physical non-access; and it seems to us " to combine as much precision as can be expected, " when we admit the principle of receiving moral evi- " dence. It accords, too, with the justice of the case; " for a child born and reared under the circumstances " we have supposed, is brought up to no expectations— " he does not look upon himself as the representative " of his mother's husband, nor as the heir to his titles " or estates; he is deprived of no inheritance, for " the property of the family is enjoyed by the ac- " knowledged heir. While, on the other hand, the " greatest injustice is done in destroying the title of " those who, perhaps for a long series of years, have " been in undisturbed possession; and by suffering the " invasion of one who has always believed himself to " be 'lord of his presence and no land beside,'—who,

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" at best, is reconciled to his obscurity and depriva-
" tions by having known no better state[1]."

An important fact which tends to destroy the whole force of this statement, so far at least as *concealment* is *conclusive* evidence that there had been no sexual intercourse between the husband and wife, has been overlooked. There are many circumstances which might induce a vicious wife and depraved mother to affiliate her husband's child to another person, or to conceal from him the knowledge of its existence. If, for example, whilst cohabiting with her husband, she had an adulterous connexion with another man, she may be uncertain to which of them the infant owed its paternity; and it is not unreasonable to suppose that her affection for her paramour, would make her anxious to persuade both him and herself that he was the real father of the child. A regard for her own character and the accomplishment of her object would equally cause her to keep her husband in ignorance of her delivery, and yet the infant may have been actually engendered by him[2]. Con-

[1] *Edinburgh Review*, vol. XCVII. p. 207.

[2] This point is extremely well expressed in the following extract from the *Law Magazine*, vol. IV. pp. 41, 42:

" It stands from the *Banbury* Peerage case, that presumption of legitimacy may be rebutted by *physical* evidence *proving*, or by *moral* evidence *rendering probable*, the contrary. Mr. Phillips is, therefore, justified in laying down as a doctrine to be extracted from this case, that the Jury may not only take into consideration proofs tending to show the physical impossibility of the child born in wedlock being legitimate; but they may decide the question of paternity by attending to the relative situation of the parties, their habits of life, the evidence of conduct, and of declarations connected with conduct, and to every induction which reason suggests for determining upon the probabilities of the case [*Law of Evidence*, vol. II. p. 288]. Such a Law has at least the disadvantages of uncertainty, and of holding out strong encouragement to fraud and perjury. To what evils it may hereafter give rise, we do not venture to predict. But of one thing we are sure, that *it puts in peril the legitimacy of every child who may have the misfortune to*

cealment on the part of the wife might also arise from a desire to be revenged upon her husband for some real or imaginary wrong by disappointing his hopes of an heir. It may likewise be caused by a bribe having been given to the mother by the husband's relations, who, in the event of his dying without issue, would succeed to his property. These suppositions certainly proceed upon the presumption that there may be unnatural mothers; but though happily such monsters are rare, they are by no means unknown.

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It has always been the object of the Law of Legitimacy, as well on the Continent [1] as in England, to

spring from an adulteress. It needs no ghost to teach as that *such a woman will rather ascribe the paternity of her offspring to a favoured lover than to a detestable husband.* She will try to believe it so, and communicate the belief to her paramour. He is not unlikely to be flattered and pleased by the intelligence, and may be anxious to possess himself of the child from birth, to rear and educate as his own. But this is impossible without concealment. A secret confinement is resolved on, and the child conveyed away at once, and placed under the adulterer's care. It cannot be denied that this child is bastardized by the new Law. Yet he possibly, may be equally legitimate with the most chastely descended Peer who condemns him."

[1] In the very remarkable case of *De Pont*, given by Mr. Le Marchant, in the Appendix to the *Report of the Gardner Peerage*, p. 501, in which the Court acted upon the legal presumption against the strongest probabilities, because there was no evidence to show the *impossibility*, the Counsel said: "The testimony of the witnesses is not of sufficient weight to defeat the maxim of 'pater est quem nuptiæ demonstrant.' Nothing but absolute physical impossibility of the husband being the father can bastardize a child born in wedlock. Moral impossibility is too vague and indefinite to be admissible; it is founded entirely on circumstances, and the effect of these circumstances may be different upon different minds. The object of the Law has been to lay down a rule which is wholly independent of individual discretion, and not to expose the judgment of the Court to the sophisms or the uncertainties which must attend such a discussion. Physical impossibility is the safest rule that human ingenuity could devise for this purpose, and it has been invariably adopted by our tribunals."

The Law on the subject of Legitimacy in the *Code Napoleon* is as follows:

Art. 312. "L'Enfant conçu pendant le mariage a pour père le mari. Néanmoins celui-ci pourra désavouer l'enfant, s'il prouve que, pendant le temps qui a courru depuis le trois-centième jusqu'au cent-quatre-vingtième

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prevent the status of the child of a married woman from being affected by the conduct of any person after it is born. Its birth is a fact capable of proof, but its engendure can never be positively ascertained; hence the adoption of a maxim which protected the rights of children born in wedlock from being destroyed by the caprice, the depravity, or the folly of their parents. Any test of legitimacy which depends upon the conduct of others is therefore at variance with the fundamental principle of the Law of Legitimacy. For these reasons concealment cannot be considered *conclusive* evidence of bastardy, or even of the mother's adultery, though it will form a strong feature in every case, so long as any evidence is admitted to rebut the established maxim that *pater est quem nuptiæ demonstrant*, other than evidence to show the *impossibility* of the husband's having begotten the child.

Whether the Courts will again adopt and adhere to "that plain sensible maxim" is perhaps doubtful; but it is confidently submitted, that human wisdom has not yet discovered any rule of Law on this subject which has produced more practical benefit to morals, or tended so much to the interests, security, and repose of society.

jour avant la naissance de cet enfant, il était, soit par cause d'éloignement, soit par l'effet de quelque accident, dans l'impossibilité physique de cohabiter avec sa femme.

Art. 313. Le mari ne pourra, en alléguant son impuissance naturelle, désavouer l'enfant: il ne pourra le désavouer même pour cause d'adultère à moins que la naissance ne lui ait été cachée, auquel cas, il sera admis à proposer tous les faits propres à justifier qu'il n'en pas le père."

CASE

OF THE

EARLDOM OF BANBURY.

Case of the Earldom of Banbury.

Sir William Knollys, Earl of Banbury, the second son of Sir Francis Knollys, K. G., by Katherine, daughter of William Carey, esq., sister of the Earl of Hunsdon, was born about the year 1547. His eldest brother, Henry Knollys, died in vita patris, leaving two daughters, Elizabeth and Lettice, his co-heirs, and by the inquisition taken on the death of Sir Francis Knollys, it was found that he died on the 19th of July 1596; that his said two grand-daughters were his heirs; and that his son, William Knollys, was his heir male, and then fifty years of age and upwards. The inquisition also found that Sir Francis Knollys was seised of the manor of Rotherfield Greys, in the county of Oxford, which he held under letters patent of Henry VIII., confirmed by two statutes, one of the 32nd and the other of the 37th Hen. VIII., to him and the heirs male of his body, together with the manors of Cholcey and Caversham, in Berkshire, and of other lands; that by an indenture dated on the 11th of March, 37th Eliz. 1595, he had settled the manors of Caversham and Cholcey on himself for life, with remainder to his sons William, Robert, Richard, Francis, and Thomas, and the heirs male of their bodies respectively, for the "continuance of the said lands in the name and blood of Knollys."

Sir William Knollys was created Baron Knollys of Greys on the 13th of May, 1st Jac. I. 1603; Viscount of Wallingford on the 7th of November, 14th Jac. I. 1616; and Earl of Banbury on the 18th of August, 2nd Car. I. 1626, with limitation of all the said dignities to him and the heirs male of his body. The patent of the Earldom

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stated that his Majesty intended to have raised him to that dignity at his coronation, and to have placed him first of the Earls then created; but in consequence of his dangerous illness, his Majesty had resolved to wait until a more convenient time. The King therefore granted to him and the heirs male of his body, the title and dignity of Earl of Banbury, with precedence next after Francis Earl of Westmoreland, and next before Henry Earl of Manchester, notwithstanding any other patent before made to the contrary.

Although Lord Banbury, then Lord Knollys, was seised of the manor of Rotherfield Greys as heir male of his father, under the patent and statutes of Henry the Eighth, he obtained a re-grant of that manor from James the First, on the 16th of April 1610, to hold to him and Lady Elizabeth his wife, and the heirs male of his body, in default of which, to the heirs male of the body of Sir Francis Knollys, his late father; and on the 6th of December, 19th Jac. I. 1621, it was again granted to him and his wife, to hold during their natural lives, and for the life of the survivor of them, with remainder, after the decease of both, to the heirs male of his body, failing which, to the heirs male of the body of Sir Francis Knollys, his late father. On the 8th of February, 20th Jac. I. 1623, the King granted to William Viscount Wallingford, and Lady Elizabeth his wife, and the heirs male of the body of Sir Francis Knollys, knight, deceased, late father of the aforesaid Viscount Wallingford and of Katherine his wife, likewise deceased, mother of the said William Viscount Wallingford, between them lawfully begotten, the manors of Cholcey[1], Whitley, Hackborne, and Aston Upthorpe, in the county of Berks, the lordship or late preceptory of Sampford, in the county of Oxford, the manors of Horspath, Church Cowley, Temple Cowley,

[1] This manor was granted to Sir Francis Knollys, and the heirs male of his body, by patent, in the 6th Eliz. 1546.

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Littlemore, and Essingdon, in the same county, and Cheriton, in the county of Wilts, late parcel of the possessions of the dissolved monasteries of Reading, Cirencester, and St. John of Jerusalem, and also the manor of Rotherfield Greys, in the county of Oxford, late in the tenure of John Russell. The King further granted to the aforesaid William Viscount Wallingford, and Elizabeth his wife, and the heirs male of the body of the said William Viscount Wallingford, and in default of such issue, to Francis Knollys, knight, brother of the aforesaid William Viscount Wallingford, and Lettice his wife, and the heirs male of the body of the said Francis Knollys, the brother, and in default of such issue, to the heir male of the body of the aforesaid Francis Knollys, by Katherine his wife (the father and mother of the said William Viscount Wallingford and Francis Knollys the brother), between them lawfully begotten, all the park of Whitley, in the county of Berks[1].

The Earl of Banbury married, first, Dorothy, daughter of Edmund Lord Bray, and widow of Edmund Lord Chandos, who died in October 1605, by whom he had no issue; and on the 23rd of December in the same year, at which time he was about fifty-eight years of age, he executed a settlement before his marriage with Lady Elizabeth Howard, eldest daughter of Thomas Earl of Suffolk, which lady was then little more than nineteen years old.

A mistake appears to have hitherto prevailed respecting the age of Lady Banbury, which it is necessary to correct, because deductions have been drawn from it, of material consequence with respect to the legitimacy of her children. It has been supposed that she was born in the year 1583, in consequence of the inscription to her memory in Dorking church stating, that she died on the 17th of April 1658, at the age of

[1] *Printed Evidence*, pp. 178-191.

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seventy-five[1]. But there seems to have been an *error* of nearly *three years* in that statement; for as the Countess was baptized on the 11th of August 1586[2], her birth probably took place only a very short time previous to that date, it being then the custom to baptize children on the same day, or at the farthest, three or four days after they were born.

By the Earl's marriage-settlement he covenanted to levy a fine, before the 13th of February next ensuing, of the manors of Caversham, and Cholcey, in Berkshire, to vest them in trustees to the use of himself and the said Lady Elizabeth Howard, and of the heirs male of their bodies, in default of which, to the use of the heirs male of the body of Sir Francis Knollys, his late father, in default of which, to the use of his own right heirs[3].

Parliament met, for the first time after Lord Banbury's creation, on the 17th of March, 3rd Car. I., 1628, and in the list of Peers in the Journals, his name occurs between that of the Earl of Westmoreland and of the Earl of Berkshire; but he was not present on that day[4]. On the 22nd of March there was a call of the House; and it is stated that "the Earl of Banbury hath leave to be absent, and will send his proxy;" and on the same day, "the House being moved to take into their consideration whether the precedency granted to the Earl of Banbury, before some other of ancienter creation, were not preju-

[1] "Jacet sub hoc marmore noblissimum par conjugum pariter et amantissimum Edwardus Vaux Baro de Harrowden et Elizabetha quæ ex illustri Suffolcienci prosapia oriunda vidua fuerat relicta Gulielmi Knoles Comitis de Banbury: Diem obiit *illa suam decimo quinto calendas Aprilis anno salutis mundi millessimo sexcentesimo quinquagesimo octavo et ætatis suæ septuagesimo quinto* ille vero suum clausit sexto idus Septembris anno ab incarnato Domino millesimo sexcentessimo sexagessimo primo et ætatis suæ septuagessimo quarto pie' obierunt mundo vivantque in æternum Deo."

[2] Extract from the Parish Register of Saffron Walden, in the county of Essex: "August 11th, 1586, Elizabeth, the daughter of the Right honourable Lord Thomas Howard, baptized."

[3] *Printed Evidence*, pp. 6, *et seq.*

[4] *Lords' Journals*, III. 686.

dicial to the rights and inheritance of the Peers of this Kingdom, it is referred to the Committee for Privileges, &c., to consider thereof, and report their opinions to the House[1]."

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On the 28th of March the Earl Marshal reported, that " the Committee for Privileges, &c., had considered whether the precedency granted to the Earl of Banbury, by the King's late letters patents, before other Earls of an ancienter creation, might be prejudicial to the rights and inheritance of the Peers of this Kingdom, the consideration whereof was referred unto them, per ordinem, 22° Martii; and his Lordship showed that the said Committee (to inform themselves of the rights of the Peers herein) did peruse the statute of 31 Hen. VIII., for placing and ranking of the Lords; and they perused the roll also itself; and they do find the law to be full and clear, that all Lords are to be placed and ranked according to the antiquities of their creations, as it is contained in the said statute; and that the said precedency granted to the said Earl of Banbury is directly contrary to that statute. The said Earl Marshal further reported, that whilst the said Committee were in debate hereof, it pleased the King's Majesty to send a gracious message (by the Earl of Dorset), showing the occasion of his granting the said precedency to the said Earl; and his Majesty's desire to the House, that this Earl, being old and childless, might enjoy it during his time, and promising never hereafter to occasion the like dispute, &c., as is contained in the said message. And his Lordship signified to the House, that the said Committee do think it fit that this request of his Majesty be so taken into consideration, that He may receive satisfaction, without prejudice to the Peers in general, or to any man's right in particular. This report ended, the clerk

[1] *Lords' Journals*, III. p. 696.

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read the King's message, delivered to the said Committee by the Earl of Dorset, which followeth, in hæc verba; videlicet, 'His Majesty, having understood how that your Lordships (zealous in the preservation of your rights and ranks) have made question of a precedency lately granted unto the Earl of Banbury, before some other of the like degree, whose patents bear a primary date, hath commanded me to let you know, that it never was his intention to innovate anything in that kind, or, by that particular creation, to win any power, contrary to law or ancient custom, in matter of placing any one before the other. But the truth is, that his excellent Majesty, having resolved to confer that dignity on that noble gentleman at the same time with the other, then advanced, he, being the first in quality of them, was consequently to have had the first creation; but, being at that time casually forgotten, and his Majesty afterwards remembered of him, he did but assign that rank, which at first was intended, without the least thought of injuring any in the present, or ever to do the like in future. And to conclude, I have further in charge to let you know, that his Majesty desires this may pass for once in this particular, considering how old a man this Lord is, and childless, so that he may enjoy it during his time; with this assurance, that his Majesty will never more occasion the like dispute, but allow degrees to be marshalled according to the statute in that behalf.'

"This message being read, and the Act itself, made in the Parliament of 31 Hen. VIII., for placing of the Lords, being also read, upon full and deliberate hearing, and examining every part of the said Act in open House, their Lordships did adjudge and declare the said Act of 31 Hen. VIII. to be full and direct, in every point, to enjoin every Peer, upon new creation, to have place according to the time of his creation and date of his letters patent, and no otherwise; and every other ancient Peer

to hold his place according to his antiquity and creation, and no otherwise; unless it be in case of such persons, and in such places, as the said Act doth particularly mention[1]."

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On the 31st of March "the Lords were put in mind of the King's desire touching the Earl of Banbury's precedency; whereupon the Lords' Committees for Privileges, &c. were appointed to treat with those Lords whom it doth concern in particular, and to accommodate the same; and those Lords whom it doth concern, and who are now in town, to be at the said Committee for Privileges at three this afternoon, and to be treated with therein: and those Lords who are absent to be treated with when they come[2]." On the 2nd April the Earl Marshal reported, that according to the direction of this House (31° Martii ultimo præterito), the Lords' Committees for Privileges, &c. had treated with divers of the Earls who are interested in the precedency granted to the Earl of Banbury; and these Lords undernamed had given their answers concerning the same; videlicet, the Earl of Berks' answer is, out of his duty to the King, and in regard of his gracious message, and also out of particular respects to my Lord of Banbury (not concluding any other), he is willing to yield him the place as now he stands during the Earl of Banbury's life. The Earl of Cleveland, for his answer, to give precedency to the Earl of Banbury in the Parliament House, desires respite till this day sevennight; in any other place, out of respect to the King's Majesty's desire, his Lordship is willing to give him place during his life. The Earl of Monmouth is contented to give the precedency to the Earl of Banbury, during the said Earl's life, in the Parliament House, as now his name is entered. The Earl of Norwich, by authority which he hath from the Earl

[1] *Lords' Journals*, III. 703. [2] *Ibid.* p. 705.

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of Danby, by a particular letter, saith, that the said Earl of Danby is content, out of a dutiful respect to his Majesty's request to the House, to yield the precedency to the Earl of Banbury's person only, during his life, in the Parliament House, as now he is entered. The Earl of Manchester (being then present in the House, and Lord President of the Council) said, that, in contemplation of his Majesty's desire (and yet preserving his own right), he is willing that place be given to the Earl of Banbury during his own life only. Hereupon the House conceived this order to expedite this business; videlicet, 'The Lords' Committees for Privileges, &c. are to proceed to accommodate this business referred unto them, touching the precedency of the Earl of Banbury; and, by letters or otherwise, to treat with those Lords (whom it doth concern) who have not yet given their answers; and the said Committee is to use all expedition herein to give his Majesty satisfaction, and to report their answers, and to conceive a concluding order thereupon, and offer it to the House[1].'"

On the 7th of April "the Earl of Clare moved the House, to expedite the business concerning the precedency of the Earl of Banbury; and signified that the Earl of Totness doth give his consent thereto, during the Earl of Banbury's life only, in respect of the King's desire; so that now there resteth only the Earls of Mulgrave and Marlborough to be treated with herein: whereupon the Duke[2] promised to speak with the Earl of Marlborough herein, and to signify his answer to the House; and the Earl Marshal proffered to write to the Earl of Mulgrave, which were agreed on. Then the Earl of Cleveland, who in his former answer (2° Aprilis) desired respite touching the Earl of Banbury's precedency in this House, did now this day declare his consent therein

[1] *Lords' Journals*, III. 708.

[2] Duke of Buckingham, Lord High Admiral.

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also, as well as in all other places, out of his Lordship's respect unto his Majesty's desire [1]."

On the 9th of April "the Earl Marshal signified unto the House, that the Earl of Mulgrave is contented to give precedency to the Earl of Banbury, during the said Earl's life only, according to the King's desire. The Lord Admiral signified that the Earl of Marlborough, Lord Treasurer, made no scruple in giving his consent also [2]."

On the next day the following entry occurs on the Journals: "Hodie, 1ª et 2ª vice lecta est, the order conceived by the Lords' Committees for Privileges, concerning the precedency granted by his Majesty unto the Earl of Banbury before divers other Lords of an ancienter creation. This was first approved by the Earl Marshal, and, being twice read, put to the question and generally assented unto. The which order followeth in hæc verba; videlicet, 'The order touching the Earl of Banbury:— The Lords in this Parliament having understood by the Lords' Committees for the Privileges of the House, that they are clearly of opinion, the Act of Parliament 31 Hen. VIII. is most strong and plain for the settling the precedency of the Peers, according to their ancienty and times of creation, have, upon full and deliberate hearing and examining the said Act in every point, in open House, adjudged, and do adjudge and declare, the said Act of Parliament of 31 Hen. VIII. to be full and direct in the point, to enjoin every Peer, upon new creation, to have place according to the time of his creation, and date of his letters patents, and no otherwise, and every other ancient Peer to hold his place according to his antiquity and creation, and no otherwise, unless it be in case of such persons, and in such places, as the said Act doth particularly mention. And whereas his Majesty was pleased to send a gracious message to this

[1] *Lords' Journals*, III. 715. [2] *Ibid.* p. 732.

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House, to let us know that it was never his intention to innovate anything in this kind, or by that particular creation to win any power, contrary to law or ancient custom, in matter of placing any one before the other; but that his Majesty having resolved to confer that dignity on that noble person at the same time with the other then advanced, he, being the first in quality of them, was consequently to have had the first creation; but being at that time casually forgotten, and his Majesty afterwards remembered of him, he did but assign him that rank which at first was intended, without the least thought of injuring any in the present, or ever to do the like in future. As also his Majesty desired this might pass for once in this particular, considering how old a man this Lord is, and childless, so that he may enjoy it during his time, with this assurance, that his Majesty will never more occasion the like dispute, but allow degrees to be marshalled according to the statute in that behalf. The Lords do give his Majesty very humble and hearty thanks for his princely care to satisfy this House of his clear intention, and are contented (the Lords particularly interested in the precedency having first given their consents) that the said Earl may hold the same place as he now stands entered for his life only, and that place of precedency not to go to his heirs; with this proviso, that it shall not in the least degree be brought into example, to prejudice the undoubted right of the Peers, according to the full judgment pronounced; and with solemn protestation, that as his Majesty hath been pleased to promise he will never in the future seek to break the precedency settled according to the antiquity of the creation in any sort, so the Lords will never, upon any occasion hereafter, give way to any precedency, though but for life, or temporary, in any point impugning or contradicting this judgment,

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grounded upon the foresaid statute, delivered upon so great and sound deliberation and advice, with a general consent, which they have caused to be entered and enrolled, and shall be read at the beginning of every Session, in the open House, amongst the Orders.'

" The Earl of Dorset was appointed to render the thanks mentioned in this Order unto his Majesty [1]."

On the 15th of April 1628, " William Earl of Banbury was brought into the House in his Parliament robes, between the Earls of Suffolk and Sarum, (as the manner is) and placed next to the Earl of Berks [2]."

On the 3rd of November, 5th Car. I. 1629[3], the Earl of Banbury executed an indenture between himself and Lady Elizabeth his wife, on the one part, and Henry Earl of Holland, and Edward Lord Vaux, on the other part, which witnessed, that " in consideration of the *love and affection which he* (the Earl of Banbury) *beareth unto the said Lady Elizabeth his wife, having been always unto him a good and loving wife,*" and to the intent that the manor of Caversham might be settled on the said Lady Elizabeth and her heirs, to the proper use of her and her heirs, as of the free gift of the Earl, for her better livelihood and advancement, and for the better support of the estate and dignity which she enjoyeth by her marriage with the said Earl, in case she should happen to survive him, the said Earl and his wife agreed with the Earl of Holland and Lord Vaux to levy a fine, before the end of Hilary Term next ensuing, to them of the manor of Caversham, with all its appurtenances, in the counties of Oxford and Berks, to the use of the said Earl of Banbury and the Lady Elizabeth his wife, and of their heirs, and of the heir of the survivor of them for ever; and the Earl agreed that if his said wife survived him, she and her heirs and assigns should hold and enjoy the said manor, &c.

[1] *Lords' Journals*, III. 734. [2] *Ibid.* p. 739.

[3] *Printed Evidence*, pp. 12, *et seq.*

Case of the Earldom of Banbury, 1630.

The Earl of Banbury made his will on the 19th of May, 6 Car. I., 1630, by which he ordered his body to be buried in his chapel at Greys, in such manner as his executrix should direct: he gave to his servant Jerome Read 100 *l.*; to his servant Thomas Blackwall and his now wife 50 *l.*; and all the rest of his goods and chattels not before disposed of by that will, or by deed formerly by him made, he gave and devised "unto his *dearly beloved wife, Elizabeth Countess of Banbury,*" whom he made "the sole and only executrix" of his will. The witnesses were Theophilus Earl of Suffolk, his wife's brother, James Westone, Jerome Read, and Henry Pyzane.[1]

In Michaelmas Term, 6 Car. I., November 1630, the Earl and Countess of Banbury levied a fine of the manor of Cholcey to the Earl of Holland, to the use of the Earl and Countess of Banbury for their lives, and after their decease to the sole use of the Earl of Holland and his heirs[2].

On the 1st of March, 6 Car. I., 1631[3], the Earl and Countess of Banbury obtained the King's licence to alienate the manor of Rotherfield Greys to Sir Robert Knollys, to hold to him and his heirs and assigns for ever; and on the 4th of that month an indenture[4] was executed between the Earl and Countess on the one part, and the said Sir Robert Knollys on the other, which witnessed that it had been concluded and agreed that the Earl and Countess should levy a fine, before the feast of the Ascension next ensuing, to the said Sir Robert, of the manor of Rotherfield Greys, with its appurtenances, and that he and his heirs should be seised thereof of a good and lawful estate, as it was to them granted in the premises by certain letters patent, dated on the 8th of

[1] *Printed Evidence*, p. 109.
[2] Inquisition, 9 Car. I.—*Printed Evidence*, p. 22.
[3] *Ibid.* p. 191. [4] *Ibid.* pp. 143, *et seq.*

February, 20 Jac. I., 1623. A fine was accordingly levied by them[1]; and on the 28th of June, 7 Car. I., 1631[2], Sir Robert Knollys obtained letters patent from the King, granting the said manor to him, and his heirs and assigns[3].

On the 20th of April, 7 Car. I., 1631[4], an indenture was executed between the Earl and Countess of Banbury on the one part; Edward Lord Howard of Escrick, and Sir William Howard, Knight of the Bath, of the second part[5]; and Henry Goodwyn[6], and Edward Wilkinson, gentlemen, of the third part; by which it was agreed that the Earl and Countess should levy a fine of the manor of Caversham before the feast of the Nativity of Saint John the Baptist next ensuing, to the use of the Earl and his wife, and their heirs, and the heirs of the survivor of them. A fine was accordingly levied in Easter Term in that year.

Nothing more is known of the Earl of Banbury until April 1632, on the 30th of which month an indenture was executed between Sir George Whitmore, Lord Mayor of London, Martin Bond, esq., and William Gibson, merchant tailor, on the one part, and the Earl and Countess of Banbury, on the other part, by which Sir

[1] *Printed Evidence*, p. 147. [2] *Ibid.* p. 195.

[3] Sir Robert Knollys surrendered the manor of Rotherfield Greys to the Crown on the 10th of February, 9 Car. I. 1634; and on the 3rd of March in the same year, he obtained a regrant of the manor, to hold to him and the heirs male of his body, in default of which, to his brother Francis, and the heirs male of his body, with remainder to his uncle Francis Knollys, and the heirs male of his body, with reversion to the Crown. In May 1642, Sir Robert Knollys, and his eldest son, William Knollys, sold Rotherfield Greys to Sir John Evelyn, and his brother, Arthur Evelyn. *Vide Printed Evidence*, pp. 199. 206.

[4] *Printed Evidence*, pp. 17, 18.

[5] Lord Howard of Escrick and Sir William Howard were Lady Banbury's brothers.

[6] "Henry Goodwyn was secretary to the Earl of Banbury, and is so described in his pedigree, entered at the Visitation of Warwickshire in 1681." —MS. note of the late Francis Townsend, esq., Windsor Herald.

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George Whitmore, Bond, and Gibson agreed that, if the Earl and his wife should pay the rent or sum of 480 *l.*, and the sum of 6,000 *l.* upon the 2nd of May 1633, they would convey the manor, mansion, park, &c., of Caversham, unto the said Earl and Countess, and to the heirs of the survivor of them [1].

The Earl of Banbury died on the 25th of May 1632, when he must have been about eighty-five or eighty-six years of age [2]. According to one inquisition, he died at Caversham; but a deponent in the proceedings in Chancery in 1641, which will be hereafter alluded to, stated that the Earl died in Paternoster-row, in London.

As the escheator of the counties of Oxford and Berks did not hold an inquisition after the Earl of Banbury's death, 'virtute officii,' respecting the lands of which he died seised, a commission, in the nature of a writ 'de diem clausit extremum,' was issued for that purpose to the feodary and deputy escheator of Oxfordshire, on the 10th of April, 9 Car. I., 1633, nearly eleven months after the Earl's death, pursuant to which an inquisition was taken on the next day at Burford. The jury found, that the Earl and Countess were seised conjointly in fee of the manor of Caversham, with its appurtenances, in the counties of Oxford and Berks; and reference was made to the indenture between the Earl and his wife, Lord Howard of Escrick, Sir William Howard and others, of the 20th of April, 7 Car. I., 1631, respecting that manor; to the grant of the manor of Cholcey by King James the First, and of the reversion of it by King Charles the First; to the fine levied by Lord and Lady

[1] *Printed Evidence*, pp. 253, 254.

[2] In a letter containing the news of London, dated on the 23rd of February 1631–2, three months before the Earl of Banbury's decease, it is said, "the Earle of Banbury, aged four skore and six, is said now to lye upon his death-bed: but I hear that his sister, my Lady of Leicester, being six year older, can yet walke a mile in a morning."—*Ellis's Original Letters, illustrative of English History*, Second Series, vol. III. p. 268.

Banbury in Michaelmas Term, 6 Car. I., 1630, and to the indenture of the 8th of April following, all of which instruments have been adverted to. The jury also found that the Earl was seised in fee of a messuage, &c. in Henley, in the county of Oxford, called the Bowling-place; that he died at Caversham on the 25th of May last passed; that Lady Elizabeth, his wife, survived him, and was then alive at Caversham, who had entered upon and was then seised of the said premises; that the Earl *died without heirs male of his body*, and that Letitia Lady Paget, widow of William Lord Paget, Anne Willoughby, daughter and heir of Lady Elizabeth Willoughby, late wife of Sir Henry Willoughby, knight and baronet, were the *next heirs* of the said Earl; that is to say, Letitia Lady Paget being daughter and one of the co-heirs of Henry Knollys, esquire, eldest brother of the said Earl of Banbury, and Ann Willoughby being daughter and heir of Lady Elizabeth Willoughby, deceased, another of the daughters and co-heirs of the said Henry Knollys. The jury likewise found that the manor of Caversham was held of the King, of his manor of East Greenwich, in free and common soccage, and not in capite, or by knight's service; and that the manor of Cholcey was held of the King in capite by knight's service, namely, by the fortieth part of a knight's fee.

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About the 10th of April 1627, the Countess of Banbury gave birth to a son, who received the name of Edward; and on the 3rd of January 1630–1, *i. e.* 1631, she was delivered of another son, who was named Nicholas. The first of these children was born when the Earl of Banbury was about eighty, and when the Countess was *between forty and forty-one*, years of age. At the time of the birth of the second son, the Earl must have been about eighty-four or eighty-five, and Lady Banbury was *between forty-four and forty-five*, years old.

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It is important to *correct an error respecting the birth of Nicholas,* the second of these sons, *which was undetected* during the proceedings on the claim to the Earldom in 1811, and which produced many most material inferences extremely prejudicial to the claimant. Nicholas Knollys was considered to have been born in January 1630, upon the authority of his own petition to the King in 1661. This date could not, however, be reconciled with his statement in the same petition, nor with the statements of the deponents in the proceedings in Chancery in 1641, which agreed in representing him to have been born "about a year and a half before the Earl's death." The discrepancy is easily explained. Nicholas Knollys and the witnesses adopted the computation which was then, and long afterwards, in general use, of commencing the Historical year on the 25th of March, instead of on the 1st of January, so that January in 1630 was January 1631, according to the present method of computation. The Earl of Banbury died on the 25th of May 1632; and as Nicholas was born on the 3rd of January 1631, he was one year, four months, and three weeks old, at the time of the Earl's death.

This correction is the more essential because it was strongly observed by Lords Redesdale, Ellenborough, and Eldon, during the claim, that the Earl of Banbury "made his Will without noticing any issue." That instrument was dated on the 19th of May 1630, when, it has been hitherto supposed, Nicholas the second son was about four or five months old, whereas *he was not born until eight months afterwards.*

Another error prevailed during the proceedings on the claim to the Earldom, which likewise created great prejudice against the legitimacy of the Countess's sons. It was taken for granted, that *she never had a child* until the birth of Edward, in 1627; and the improbability of Lord Banbury's having issue at his advanced period

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of life, by a woman who was then upwards of forty, and whose marriage-bed had been barren during a cohabitation of more than twenty years, was urged with great effect. So far, however, from this being the fact, it appears that the Countess *bore her husband a daughter*, who *died young some time before* **1610**[1]; and for any-

[1] It is stated in *Milles' Catalogue of Honour*, p. 546 (which was published in 1610), in the account of Thomas Lord Howard of Walden, and Earl of Suffolk, that by his wife Katherine, eldest daughter and co-heir of Sir Henry Knyvet, of Chorlton, he had, besides seven sons and three daughters, "Elizabeth, married to William Lord Knolles, Baron of Grayes, *who bare unto him a daughter, which died young.*"

This statement is supported by that of Ralph *Brooke*, York Herald, in his *Catalogue of Nobility*, which was printed in **1619**, where it is said, that Lord Banbury's "second wife was Elizabeth, the eldest daughter of Thomas Howard, Earl of Suffolk, and Lord Treasurer of England, *by whom he had issue*," p. 276. *Augustine Vincent*, a Herald of great reputation, republished Brooke's work in 1622, with the sole motive of detecting his errors, which he exposed with much bitterness and severity. But so far from contradicting Brooke's assertion, that Lady Banbury had had issue by her husband, he *made it his own*, by adding to Brooke's words above quoted, "*which died young.*"—Vincent's *Discovery of Errors in the Catalogue of Nobility*, p. 645.

The statement is farther corroborated by an elaborate pedigree of the family of Knollys, in the handwriting of Peter Le Neve, Norroy King of Arms, about the year 1693, in the *Harleian MS.* 5808, in the British Museum, where he notices the rumour that the two sons were begotten privately by Lord Vaux, and the certificate, in the Heralds' College (which will be hereafter alluded to), that the Earl had no children; and gives the Earl of Banbury's marriage and issue in the following manner:

William Lord Knolles, of Greys, Earle of Banbury. = Elizabeth, eldest daughter of Thomas Earl of Suffolk. = Nicholas Lord Vaux, 2nd husband.

- A daughter.
- Edward, slain in a quarrel on the road between Calais and Gravelyn. S P.
- Nicholas, commonly called Earl of Banbury. Never summoned to Parliament. Obiit . . . = Anne, daughter of Sir William Sherrard Lord Sherrard. Obiit 6 May 1680.
  - Charles, called Earl of Banbury, 1693. = ...

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thing which is known to the contrary, she may have had several other children previous to the year 1627.

The Countess of Banbury married Edward Lord Vaux within five weeks of the Earl's decease; and she is described as his wife in an indenture dated on the 2nd of July, 8th Car. I. 1632, between Lord Vaux and herself on the one part, and Edward Wilkinson, of Bucton, in the county of Northampton, gentleman, and Christopher Wilton, of the same place, yeoman, of the other part, by which it was agreed that Lord Vaux and his wife should levy a fine, before the 30th of November then next ensuing, unto the other parties, of the manor of Caversham, to the use of Lord Vaux, Wilkinson, and Wilton, and their heirs and assigns. The indenture of the 30th of April preceding, between the late Earl and Countess of Banbury, and Sir George Whitmore and others, respecting the mortgage of 6,000 *l.*, is then recited, and the indenture proceeds, "and whereas the said Earl of Banbury is deceased and the said Lady Elizabeth survived him; and whereas the said Lady Elizabeth hath since married and taken to husband the said Edward Vaux Lord Harrowden; now this indenture further witnesseth, &c." that she, with her said husband's consent, hath nominated and appointed the mortgagees, upon payment of the mortgage, to convey the manor, &c. of Caversham unto Lord Vaux, Wilkinson, and Wilton, and their heirs and assigns for ever.[1] On the same day on which she executed this indenture she obtained probate of Lord Banbury's will;[2] but neither in the probate, nor in the Inquisitio post mortem, taken in April following, is there any notice of her being married to Lord Vaux.

On the 9th of February 1640–1, a Bill was filed in Chancery by Edward, the eldest of the said sons, by

[1] *Printed Evidence*, pp. 251–255. [2] *Ibid.* 255.

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the description of "Edward Earl of Banbury, an infant, by William Earl of Salisbury, his prochein amy and guardian," which nobleman having married Lady Katherine Howard, sister of the Countess of Banbury, was the infant's uncle in law, against Henry Stephens, of Essington, in Oxfordshire, gentleman. The Bill, which was to perpetuate the testimony of witnesses, for a discovery of deeds and writings, and for other matters, stated that the plaintiff's father, William Earl of Banbury, was seised in fee, by purchase from John Gray and Samuel Jones, of a plot of ground in Henley-upon-Thames, in Oxfordshire, called the Bowling-place, with a tenement, curtilage, and other appurtenances, late in possession of John Stevens, deceased: that on Earl William's death, about eight years before, this estate descended upon his son and heir, the plaintiff, Earl Edward; but that the defendant, Henry Stevens, knowing the plaintiff to be very young at the death of his father, and having gotten into his custody the original deed of purchase of the premises, and other writings concerning the same, had pretended title to the same Bowling-place and premises, claiming sometimes the inheritance under a conveyance from Earl William, and sometimes to have a lease for years from him, which if it was so, the Bill alleged to be with a reserved rent to Earl William and his heirs, and consequently to redound to the plaintiff as eldest *son and rightful heir* of Earl William, and born in his life-time; and that the defendant sometimes gave out, that the plaintiff was *not the son and heir* of Earl William. Then in respect that the plaintiff's most material witnesses, who could prove the said matters, were aged and infirm, so that unless they were speedily examined, and their testimonies preserved by the Court's authority, the plaintiff was likely to lose the benefit of their testimony. The Bill, after alleging the

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plaintiff to be without remedy at law, for want of the writings and evidences, and after waiving all advantage of forfeiture for not paying rent, or not repairing, sought, that the defendant might set forth what estate he claimed in the premises ; and if there was a lease, what rent was reserved, and when it was to cease ; and might show, if he could, why he should not pay the arrears of ren tand the future rent to the plaintiff, as son and heir of Earl William ; and set forth what deeds, evidences, and other writings, he, the defendant, had, concerning the premises of right belonging to the said Earl. This is immediately followed in the Bill with praying for a subpœna against the defendant in the usual manner. By the answer of Henry Stevens, which appears to have been sworn on the 13th of February 1640-1, he admitted Earl William's having been seised in fee of the Bowling-place and premises; but he stated that the said Earl had made a lease of them to the defendant's kinsman, John Stevens, for a number of years still enduring, which the defendant could not precisely set down, by reason of the present want of the lease, at a rent of 2 *s.* The defendant next stated his title, as legatee of the lease under a devise in John Stevens's will, and as his executor, and the possession coming to him, the defendant, accordingly, and his being still in possession. The defendant's answer admitted, that Earl William died seised ; and that on his decease the reversion of the premises expectant on the said lease descended to his next heir, for ought that he, defendant, knew to the contrary ; but said, whether the said complainant was the son and heir of Earl William the defendant knew not of his own knowledge. After also explaining his having no other writings concerning the title to the premises than the said lease and the said John Stevens's will, the defendant said that he did not remember the lease having a clause of re-entry. He

said also there was a covenant, on the lessee's part, to repair. But in regard the complainant was unknown to him to be the son and heir of the said late Earl of Banbury, and had not demanded any rent of the defendant, he confessed that he had not paid any rent to him since the death of the said John Stevens. But the defendant said, that he would be ready to pay the rent reserved and the arrears, when it should appear to him that the complainant was the son and next heir of the said William, late Earl of Banbury.

Five witnesses were examined in the cause, and their Depositions were to the following purport:

The first witness examined was *Anne Delavall,* who is described as the wife of Francis Delavall, of Caversham, in Oxfordshire, esquire, and as aged forty and upwards. She swore to having known the plaintiff, Edward Earl of Banbury, from his birth; that he was born of Elizabeth, Countess of Banbury, wife of William Earl of Banbury, about five years before his death; that the plaintiff was so born at Earl William's mansion-house of Greys, in Oxfordshire; that Earl William was resident at Greys at the time of the plaintiff's birth; that she remembered Earl William's coming into the chamber where Elizabeth his Countess, mother of the plaintiff, then was, a little before her being delivered of the plaintiff. She also swore that Earl William desired persons to be sent for to give ease to the Countess; that the Countess was shortly after delivered; that the midwife of the Countess was a Mrs. Price, of the parish of St. Giles, in Middlesex, who, as the witness, Mrs. Delavall, was informed, and believed, was since dead; that shortly after the plaintiff's said birth, he was, in the time of his nursing, committed to the care of the witness, Mrs. Delavall, she living at the time in the house with the Countess; that she, the witness, removing

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to her own house to dwell, and taking the plaintiff with her, Earl William, whilst the plaintiff was with her, repaired to the house of the witness to see the plaintiff, and wished her to take care of " his boy," the plaintiff being meant. Mrs. Delavall further swore, that she was a servant, and had relation unto the said Countess, as an attendant upon her at times, for about thirteen years before the said Earl William's death; that, as she verily believed, the said Earl and Countess did, during all the time aforesaid, and unto his death, live lovingly as man and wife; and that she never heard anything to the contrary.

The second witness was *Francis Delavall,* described to be of Caversham before mentioned, esquire, and to be aged fifty-five, or thereabouts. He swore that he knew the plaintiff, Edward Earl of Banbury, from his birth; that he knew William, late Earl of Banbury; that the plaintiff, Earl Edward, was born of Elizabeth Countess of Banbury, in the lifetime of the late Earl, namely, about five or six years before his death, at the late Earl's mansion-house at Greys, in Oxfordshire; that the late Earl was resident there at the birth of the plaintiff; that, as witness was told by his wife Anne, the first witness, and as he believed, the late Earl did come into the chamber where the Countess, mother of the plaintiff, was, a little before her delivery, and desired to have persons sent for to give her ease; that the Countess was the same day delivered of the plaintiff; and that the midwife was the before-mentioned Mrs. Price, who, as witness was informed, and believed, was since dead. He likewise swore, that the plaintiff was, shortly after his birth, committed to the care of the before-mentioned Anne Delavall, his wife; that William, the late Earl, did, whilst plaintiff was in the care and custody of his, Mr. Delavall's, wife, repair to the house where they then

were to see the plaintiff, and as witness was told by his wife, and believed, the late Earl, upon such his coming to see the plaintiff, wished her to take care of "his boy." He also swore that he was a servant and retainer to William, the late Earl of Banbury, for about twenty years next before his decease, and during that time, unto the late Earl's decease, observed him and his said Countess to live lovingly as husband and wife, and never knew nor heard, to his remembrance, of any unkindness between them.

The third witness was *Robert Lloyd*, who is described in the examination to be of St. Giles, in Middlesex, doctor in physic, and aged fifty-six, or thereabouts. He swore, that he knew the plaintiff, Edward Earl of Banbury, from his birth; that he knew William, the late Earl of Banbury; that the plaintiff was born of Elizabeth Countess of Banbury, about six years before the death of William, the late Earl; that the plaintiff was born at the mansion of William, the late Earl of Banbury, at Greys, in Oxfordshire; that the late Earl was resident at the said house at the time of the plaintiff's birth; and that, as witness had credibly heard, the late Earl came into the chamber where the Countess Elizabeth, his wife, and mother of the plaintiff, was, a little before her delivery of the plaintiff. He further swore, that William, late Earl of Banbury, and the said Lady Elizabeth, his wife, lived lovingly and kindly together as husband and wife, from the time the witness became acquainted with them, which was for divers years before his death, unto the time of his death; that he, the witness, better knew the same, because both he and his wife did, after such acquaintance with the late Earl and his Countess, use much the several houses where they lived, in Oxfordshire, Berkshire, Northamptonshire, and London, and was very intimately acquainted and conversant with

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them, and was often sent for by them, and several times resident with them for a good space of time together at their country house. He likewise swore, that he was with the said late Earl in the time of his last sickness, whereof he died, at Dr. Grant's house, in Paternoster-row, London, to consult as a physician, both with the said Dr. Grant and with Dr. Gifford, touching the late Earl's then sickness; and that he, the witness, observed the late Earl's then having his said lady with him, and their living lovingly and kindly as before: but that he, the witness, was not a servant to them, or either of them, as by the latter part of the particular interrogatory he was in this part answering was supposed; and that therefore he could not, to his remembrance, further depose what was material thereto.

The fourth witness was *Robert Clapham*, described in the examination as gentleman, and as then servant to Henry Earl of Holland, and as aged sixty years, or thereabouts. This witness swore, that he knew the plaintiff from his birth; that he knew William late Earl of Banbury; that the plaintiff was born of Elizabeth Countess of Banbury, his wife, about four years before the Earl's death, as witness took the time; the plaintiff was born at the mansion-house of William the late Earl, at Greys, in Oxfordshire; and that, to the best remembrance of the witness, the late Earl was then resident at the said house; that he, the witness, had credibly heard of the said Earl's coming into the chamber of the said Countess, his wife, mother of the plaintiff, a little before her being delivered of him. He also swore, that he had credibly heard of, and believed, the plaintiff's being committed, shortly after his birth, to the care and custody of the witness, Anne Delavall; but that he could not depose whether or no William, the late Earl, whilst plaintiff was in custody of Anne Delavall, repaired to see the

plaintiff, or whether or no he wished her to take care of "his boy." He further swore, that he, deponent, during the time he lived as a servant with said late Earl, which was for about sixteen years before his decease, observed the said late Earl and said Lady, his wife, to live very lovingly and kindly together as husband and wife, even to the time of the said late Earl's decease, so that deponent conceived no man and wife could live more lovingly and kindly together than they did; and that he, deponent, was better able to depose as before, for that, during the time aforesaid, he was the said late Earl's servant, and constantly waited upon him in his chamber.

The fifth witness was *Margaret Kent*, described in her examination to be of Boughton, in the county of Northampton, widow, and aged fifty years, or thereabouts. She swore, that she knew Edward Earl of Banbury, the plaintiff, from his cradle; that the plaintiff was born of Elizabeth Countess of Banbury, wife of William, the late Earl, in his lifetime, about five years next before his decease, so near as deponent could remember the time; that plaintiff was born at the mansion-house of the said late Earl at Greys, in Oxfordshire; that she, the witness, was very credibly told by divers, or at least some of said Earl's servants, then resident in the said house, and she believed it to be very true, that the late Earl was in his house called Greys at the birth of the plaintiff, and came into the chamber where the Countess his wife, mother of the plaintiff, then was, a little before her being delivered of plaintiff. She also swore, that the plaintiff was, shortly after his birth, committed to the care and custody of the before-mentioned Anne Delavall; and that the said late Earl, whilst plaintiff was in the custody of said Anne Delavall, did repair to see the plaintiff, and did wish and desire her, the

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said Mrs. Delavall, to take care and make much of "his boy," all which the deponent did the better know, for that she, deponent, did at the time look unto and attend to the said plaintiff, under the said Mrs. Delavall. She also swore, that said William Earl of Banbury and said Lady Elizabeth, his wife, did live lovingly and kindly together as husband and wife, during all the time of the deponent's knowledge of them, unto the time of the said late Earl's decease; and that she, deponent, better knew the same, by reason she was a servant unto the said Countess of Banbury for about five years, as she, deponent, took the time before the said late Earl's decease; and that she, the deponent, did observe said late Earl and said Countess, his wife, in the time aforesaid, to live as kindly and lovingly together as man and wife could possibly do, as the deponent conceived; and that, as she, the deponent, remembered, the said late Earl, in part of expression of his love to said Countess, would oftentimes stroke her face, and take her by the hand, and familiarly call her "my Bessy," and the like; and the said Countess did in like manner return the expression of her love to him again.

These Depositions, on being tendered in evidence in support of the claim in February 1809, were, after reference for the opinion of the Judges, rejected by the House of Lords, as inadmissible to prove the facts stated therein[1].

[1] *Printed Evidence*, pp. 28, 103–108. The Attorney-general objected to the admission of this evidence, on two grounds:

1. Because the suit was res inter alia acta.

2. Because it did not appear that the witnesses were connected, in the manner stated by them in the depositions, with the persons respecting whom they deposed: the admission of hearsay evidence in cases of pedigree being confined to relations interested in the state of the family, and persons intimately connected with it.

The Counsel on both sides having been heard at great length, the following questions were submitted to the Judges:

In consequence, it is presumed, of these Depositions, a writ of mandamus, or a commission of that nature, was

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" Upon the trial of an ejeetment brought by E. F. against G. H. to recover the possession of an estate ealled Black Acre, E. F. to prove that C. D., from whom E. F. was descended, was the legitimate son of A. B. (and which fact it was necessary to prove), offered to read in evidence a Bill in Chancery, purporting to have been filed by C. D., one hundred and fifty years before that time, by his next friend, such next friend therein styling himself the uncle of the infant, for the purpose of perpetuating testimony of the fact, that C. D. was the legitimate son of A. B.; and which Bill states him to be sueh legitimate son, (but no persons, claiming to be heirs at law of A. B. if C. D. was illegitimate, were parties to the suit, the only defendant being a person alleged to have held lands under a lease from A. B., reserving rent to A. B. and his heirs), and also offered to read in evidence depositions taken in the said cause, some of them purporting to be made by persons styling themselves relations of A. B., others styling themselves servants in his family, others styling themselves to be medical persons attendant upon the family, and in their respective depositions stating facts, and declaring, among other things, that C. D. was the legitimate son of A. B.; and that he was in the family of which they were respectively relations, servants, and medical attendants, reputed, esteemed, and taken so to be."

" Are these proeeedings, viz. the Bill in Equity and the depositions respectively, or any, and which of them, to be received in the Courts below upon the trial of such ejectment (G. H. not claiming or deriving in any manner under either the plaintiff or defendant in the said Chancery suit), either as evidence of facts therein deposed to, or as declarations respecting pedigree? And are they, or any, and which of them, evidence to be received in the said cause, that the parties filing the Bill, and making the depositions respectively, or any, and which of them, sustained the characters of uncles, relations, servants, and medical persons respectively, which they describe themselves therein sustaining ?"

" 2nd. Whether any Bill in Chancery can ever be received as evidence in a Court of Law, to prove any faets either alleged or denied, in such Bill so filed in Chancery ?"

" 3rd. Whether any Depositions, taken in the Court of Chancery, in eonsequenee of a Bill to perpetuate the testimony of witnesses, or otherwise, would be received in evidence in a Court of Law, in any cause in whieh the parties were not the same parties as in the cause in Chancery, or did not elaim under some or one of them ?"

The Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the Judges upon the said several questions on the 30th of May 1809, as follows :—

" To the first question, the Judges answer, that neither the Bill in Equity, nor the Depositions stated in this question, are to be received in evidence in the Courts below, on the trial of sueh ejectment as is mentioned in the question, either as evidence of facts therein deposed to, or as declarations respecting pedigree; neither are any of them evidence to be received in the said

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ordered by the Court of Wards, upon the petition of Robert Fayrbeard, esq.[1], by the special directions of the Master of that Court, dated on the 26th of February, 16th Car. I., 1641, " to be awarded into the county of Berks, to inquire after the death of the Right honourable William, late Earl of Banbury, deceased, and the late King's Majesty's instructions for warning, are to be observed; and it is further ordered, that the Office, together with a schedule and survey, shall be returned in Easter Term next[2]." Pursuant to that writ, Robert Cooper, the escheator of the county Berks, held an inquisition at Abingdon, on the 1st of April, 17th Car. I.,

cause, that the parties filing the said Bill, or making the said Depositions, respectively sustained the character of uncle, relations, servants, and medical persons, which they describe themselves therein sustaining."

The Judges were also unanimously of opinion that it would not make any difference as to what ought to have been their answer to the first question, if the Bill in Equity stated to have been filed by C. D., by his next friend, had been a Bill seeking relief.

" To the second question the Judges answer, that generally speaking, a Bill in Chancery cannot be received as evidence in a Court of Law, to prove any fact either alleged or denied in such Bill as filed. But whether any possible case may be put, which would form an exception to such general rule, they cannot undertake to say."

" To the third question, the Judges understand the question to be this: Whether Depositions taken in the Court of Chancery, in consequence of a Bill to perpetuate the testimony of witnesses or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent as if the same were sworn to at the trial of an ejectment by witnesses then produced? To which question the Judges answer, that no such Depositions would be received in evidence in a Court of Law, in any cause in which the parties were not the same parties as the parties in the cause in Chancery or did not claim under some or one of them."

It was also proposed to put the following question to the Judges:— " Whether that which is not capable of definition, or of precise description, ought in any case to be considered as part of the common law of England?"

This being objected to, it was, after debate, put to the vote, and resolved in the negative.—*Printed Evidence*, p. 104–108.

See *Phillips on Evidence*, vol. I. p. 246 (Edit. 1820), where the authorities on this subject are collected.

[1] It has not been ascertained who this person was.—*Printed Evidence*, p. 245.

[2] *Ibid.* 244, 245.

1641. The jury found that the Earl was seised in fee of the manor of Cholcey and its appurtenances, in the said county, under the fine levied of the said manor in Michaelmas Term, 6th Car. I. between Henry Earl of Holland, plaintiff, and the Earl and Countess of Banbury, deforciants, &c., and the indenture of the 8th of April, 7th Car. I., which have been before mentioned; that the said Earl was also seised in fee of the messuage in Henley, in Oxfordshire, commonly called the Bowling-place; that he *died in the city of London* on the 25th of May, 8th Car. I.; that Elizabeth Countess of Banbury, his wife, survived him, and was then living; *that Edward, now Earl of Banbury, is, and at the time of the Earl's decease was, his son and next heir*; and *at the death of his said father was five years, one month, and fifteen days old.* The jury likewise found that the said manor of Cholcey was held of the King in capite by the fortieth part of a knight's fee; that the messuage in Henley was held of the manor of East Greenwich in common soccage; that the Countess of Banbury had received the issues of the manor of Cholcey from the death of the Earl to the day when that inquisition was taken; and that John Stevens and Henry Stevens received the profits of the messuage, &c. in Henley during the same period [1]. This inquisition was delivered into Chancery on the 9th of April 1641, by John Salmon, who was one of the commissioners by whom the previous inquisition in 1633 was taken.

Case of the Earldom of Banbury, 1641.

In June 1641, "the Countess of Banbury and her youngest son" obtained "a licence to travel, and to take with them twelve servants, 200 *l.* in money, and her necessary carriages [2]." Though hitherto unnoticed, it is certain that between the years 1641 and 1644 the Countess of Banbury was an object of constant suspicion to the Parliament, as a dangerous recusant, and as

[1] *Printed Evidence*, pp. 25-28. [2] *Ibid.* p. 110.

Case of the Earldom of Banbury, 1642.

a person so deeply involved in political intrigues, as to make it necessary at one time to send her out of the realm, and at another to seize her person.

On the 20th of January 1641–2, four justices of the peace were ordered to search the house of Lord Vaux (who was then out of the kingdom[1]) at Harrowden, and such other suspected places in Northamptonshire, for recusancy, as they shall think fit, for arms, and to seize whomsoever they might find, and place them in safe custody, pursuant to a former ordinance of Parliament[2]. In June in that year she obtained leave to transport with her, apparently to France, six coach-horses and three nags[3]; but on the 16th of March 1642–3, the House of Commons desired a conference with the Lords, to represent what had been that day reported from the Committee "concerning the Countess of Banbury; and to desire, that in regard it is informed, that she is a recusant, and one that entertains intelligence, that she may be confined to her house[4]." On the 12th of July following, the House of Commons resolved, "that the Countess of Banbury, a professed papist, shall be secured; and the Lords' concurrence desired therein[5]." On the 12th of August, the House appointed three of its members to open certain trunks in the house of a Mr. Trenchard, which were suspected to belong to the Countess of Banbury, and sent thither by the Earl of Bedford; and if they found that they were hers, to send them to Guildhall, but if they belonged to the Earl of Bedford, to secure them there[6]. It was, however, dis-

[1] *Lords' Journals* of 9th February 1641–2, whence it appears that Lord Vaux was then "extra regnum."

[2] *Commons' Journals*, II. 387.

[3] *Lords' Journals*, V. 156. It was probably to Lord Vaux and herself that the following order of the House of Commons, on the 30th of June 1642, referred: "Ordered, that a warrant shall issue forth under Mr. Speaker's hand, for Mr. Vaux, his wife, and his two servants, with their baggage, to pass over sea into France, provided they carry no prohibited goods."—*Commons' Journals*, II. 646.

[4] *Commons' Journals*, III. 4. [5] *Ibid.* p. 163. [6] *Ibid.* p. 204.

Case of the Earldom of Banbury, 1643.

covered that the trunks were the property of her brother Edward Lord Howard, to whom the House ordered them to be restored on the 18th of August; but it was on the same day determined to request the Lords to join with the House, that the Countess of Banbury be forthwith removed from this town [London], or otherwise that her person may be secured[1]. A conference was held on the next day, and it was ordered that the Countess should have the Speaker's warrant to go into France with twelve servants and her necessary apparel, and for "a coach and six horses and ten saddle horses to pass to the sea-side, and to return to carry her Ladyship and her servants to the port where she embarks[2]." In June 1644, when she is mentioned for the last time in the Journals of the House of Commons, she was still an object of great suspicion, for it was ordered on the 13th of that month, that "notice be given to the several ports, that if the Countess of Banbury shall come into any of the ports, that they seize her, and keep her under restraint, until the House shall take further order[3]."

Edward Knollys, the eldest son, who, by the Inquisition of 17th Car. I, was found to be the son and heir of William Earl of Banbury, assumed that title; and Evelyn states that Lord Banbury was travelling in Italy in January 1645[4]. He was killed near Calais during his minority, in or before June 1646; and dying without issue, his brother Nicholas, who was then about

[1] *Commons Journals*, III, p. 210.

[2] *Ibid* pp. 211, 212. [3] *Ibid.* p. 528.

[4] "January 28, 1644-5.—We dined at Sermoneta, descending all this morning down a stony mountain, unpleasant, yet full of olive trees; and anon pass a tower built on a rock, kept by a small guard against the banditti who infest these parts, daily robbing and killing passengers, *as my Lord Banbury and his company found to their cost a little before.*"—*Diary*, Vol. I, p. 229.

Case of the Earldom of Banbury. 1646.

fifteen years of age, immediately assumed the title of Earl of Banbury.

By indentures, dated on the 19th of October, 22 Car. I., 1646, between Edward Lord Vaux and Elizabeth Countess of Banbury, then the wife of the said Lord, of the first part; William Earl of Salisbury, Edward Lord Howard of Escrick, and Sir Robert Thorold, of Harrowby, in the county of Lincoln, knight and baronet, of the second part; "*the Right honourable Nicholas now Earl of Banbury son of the said Countess of Banbury heretofore called Nicholas Vaux, or by whichsoever of the said names or descriptions or any other name or description the said Nicholas be or hath been called reputed or known,*" of the third part; and Mathew Horne, of Great Harrowden, in Northamptonshire, gent., and William Buckmaster, of Boughton, in the said county, yeoman, of the fourth part; witnessed, that for assuring a jointure to the said Countess, in case she survived the said Lord Vaux, and for settling the manors, &c. of Great Harrowden, Little Harrowden, Irtlingborough, Burton Latimer, and other lands, in the county of Northampton, upon the said Nicholas, the said Lord Vaux covenanted with the said Earl of Salisbury, Lord Howard and Sir Robert Thorold, that he and the Countess of Banbury, his wife, would levy a fine, before Hilary Term next ensuing, of the said manors, &c. to the other parties to the indenture, for the use and behoof of the said Edward Lord Vaux for his life, and after his decease to the use of Elizabeth Countess of Banbury, his wife, for her life, and after his and her decease to the use of the "said Nicholas" and of the heirs male of his body; and for want of such issue, then to the use of the "said Nicholas" and the heirs of his body; and for want of such issue, then to the use of them the said Edward Lord Vaux and Elizabeth his wife, and of their heirs and assigns for

Case of the Earldom of Banbury, 1646.

ever. The indenture contains a clause for Lord Vaux, and after his decease, for Lady Banbury, and after their decease or other determination of their estates, "then to and for the said Nicholas Earl of Banbury," being within or of full age, to grant or appoint the said manor of Great Harrowden "to or for the use of any woman or women which he the said Nicholas Earl of Banbury shall hereafter happen to marry." It was further provided, that if by any means all or any of the uses or estates therein mentioned shall not arise and be vested and executed, or if any person or persons therein named to whom any uses or estates were limited and appointed cannot take such uses or estates, according to the true intent and meaning of the instrument, that then the fines and recoveries so levied shall enure to the use of the said Earl of Salisbury, Edward Lord Howard, and Sir Robert Thorold, and their heirs, in trust that they shall supply such defective uses and estates to the respective persons to whom they were intended. Power was reserved to Lord Vaux and the Countess of Banbury to revoke, or alter that settlement, and to resettle all the estates therein mentioned in any manner they might think proper[1]. On the 8th of June 1649, Edward Lord Vaux and Lady Banbury appeared before the custos of the liberties of England in Chancery, and recognised the said indenture[2]. The Countess of Banbury died on the 17th of April 1658, aged seventy-three; and her second husband, Lord Vaux, died on the 8th of September 1661, aged seventy-four[3].

Nicholas, Earl of Banbury, married, first, Isabella, daughter of Mountjoy Earl of Newport[4]; and secondly,

[1] *Printed Evidence*, pp. 219–230.

[2] *Ibid.* p. 230.

[3] Monumental inscription in Dorking church.—*Ibid.* pp. 14, 15. *Vide* p. 291, antea.

[4] *Ibid.* p. 46.

Case of the Earldom of Banbury, 1660.

on the 4th of October 1655, Anne, daughter of William Lord Sherard of Leitrim, and in the register of Stapleford, wherein the marriage is recorded, he is styled, "Nicholas Lord Knowles, Viscount Wallingford, Baron of Grays, and Earl of Banburie[1]."

All these facts tend to show, that the proceedings in Chancery in February 1641, and the Inquisition taken in April in that year, were considered to have established the legitimacy of the Countess of Banbury's children. Twenty years had then nearly elapsed since the adverse finding of the Inquisition of 1633, during the whole of which period, her sons had successively borne the title, and enjoyed the honours of the Earldom.

In April 1660, preparatory to the restoration of King Charles the Second, the Peers assembled in what was termed the "Convention Parliament." Writs of summons could not, of course, be issued by the Crown; but nine Peers having met, they appointed the Earl of Manchester Speaker pro tempore, and proceeded to nominate a Committee to determine to what Lords letters should be written requesting their attendance. The Committee accordingly reported the names of the Peers who were to be written to, and a draught of the letter from Lord Manchester, as Speaker, is entered on the Journals[2]. It does not appear that Nicholas Earl of Banbury was a party to those proceedings, but it is certain that he took his seat in the House on or before the 4th of June, and that he was again present on the 15th of that month[3].

To prevent any objection as to the illegality of the proceedings of that Parliament, in consequence of the King's writs of summons not having been issued for it to assemble, the first Act passed by it, was to declare and enact "that the Lords and Commons then sitting at Westminster were the two Houses of Parliament, to all

[1] *Printed Evidence*, p. 29. [2] *Ibid.* p. 37.
[3] *Lords Journals*, XI. pp. 52, 64.

intents, constructions and purposes whatsoever, notwithstanding any want of the King's writ or writs of summons." The Earl of Banbury and the other Peers must therefore be held to have had the same right to enter the House, as if they had individually received the King's writ of summons.

The first notice of any question being raised as to the Earl of Banbury's right to the dignity was on the 13th of July 1660, nearly *three months after Parliament assembled*, and *upwards* of *one month after he is mentioned as being present* in the House of Lords. It was moved on that day, "that there being a person that now sits in this House as a Peer who, as is conceived, hath no title to be a Peer, viz. the Earl of Banbury, it is ordered that this business shall be heard at the bar by counsel on Monday come se'nnight[1]," *i. e.* on the 23rd of the same month.

On Monday the 23rd of July, *the day appointed for investigating the* Earl's *right* to his title, he was *present* in the House, and was *appointed a member of a Committee on a private Bill*[2]; but *no proceedings are recorded to have taken place respecting his right to the Peerage*[3]. He was also present on the three following days: he was again on a Committee; and he attended in his place twelve days in July, and repeatedly in August, September and November, the last occasion being on the 21st of November 1660, when he obtained leave to be absent for some time; which *permission to be absent* was, at least, a tacit admission of his *right* to be *present*, and was frequently granted in the same words to other Lords. On the 29th of December following, Parliament was prorogued, so that the Earl *sat* for *nearly the entire session, which lasted upwards of six months*, during which time *no proceedings whatever occurred for*

[1] *Printed Evidence*, p. 37. [2] *Ibid.* p. 39. [3] *Ibid.*

Case of the Earldom of Banbury, 1660.

impeaching his right to the Peerage, except the order of the 13th of July; and it was proved in evidence in June 1808, that although that order was not stated to have been discharged, yet that there was no mention in the Lords Journals of the matter being heard on any day during that period; no adjournment of the consideration of the business to a future day; nor any entry of its being resumed during the session[1].

The extraordinary fact that the right of a person to sit in the House of Lords as a Peer of the Realm should be ordered to be investigated, and that no proceedings should take place during the remainder of a session which lasted for five months after the matter was agitated, though the said person enjoyed the rights and performed all the functions of a Peer of Parliament during the greater part of that time, can only be attributed to the conviction, in the minds of those who wished to disturb him, that he possessed a legal right, which could not be shaken.

It may be observed, as additional proof of the anomalies which characterize this case, that had the Earl of Banbury sat in that Parliament as a *Baron* instead of as an Earl, his right, if not to the dignity which he was supposed to have inherited, at all events to one of the same name, which would have descended to the heirs general of his body, would probably have been indefeasible. A writ to, and a sitting in Parliament pursuant to such writ, had long been held to operate as a creation of a Barony to the person so summoned, and the heirs of his body; and though no writ issued to any Peer who attended the Convention Parliament, the statute which declared that "the two Houses were the two Houses of Parliament, to all *intents*, *constructions* and *purposes whatsoever*," would probably be considered to have cured that

[1] *Printed Evidence*, p. 41.

defect, by giving to each of the Peers who were present the same rights as they would have enjoyed if they had received a writ of summons in the usual form.

Case of the Earldom of Banbury, 1660.

At the close of the session of the Convention Parliament, nothing had in fact been done to impeach Lord Banbury's legitimacy. The *Peers* who formed that Assembly admitted his right to the dignity, by allowing him to sit in the House, even if, in common with most of the other Lords, they had not written to request his attendance[1]. The *Crown* had recognised him by giving its consent to an Act of Parliament to enable him to sell some lands for the payment of his debts, in which he styled himself the King's "faithful and loyal subject, the Right honourable Nicholas Earl of Banbury;" and the *House of Lords* evinced its opinion, that the effort which was made in July to impeach his right to the Peerage could not be supported, by allowing the threatened proceedings against him to be abandoned, by permitting him to continue one of its members, and by selecting him to perform the duties of a Peer. Having been born of the body of Elizabeth Countess of Banbury during her coverture with the Earl of Banbury, he was, *primâ facie* legitimate, and therefore had a *primâ facie* right to the Peerage; and it may be contended that his having enjoyed all the privileges of legitimacy for nearly twenty years, his having been recognised by the Crown, and his having sat in Parliament, and performed all the functions of a Peer for six months, formed a perfect and complete admission of that right, which could not afterwards be justly questioned.

Notwithstanding these facts, when Parliament was summoned in May in the following year, no writ was

[1] On the 3rd of May 1660, the House was called over, and letters were ordered to be written to the absent Lords, desiring them to attend forthwith; and on the 14th of that month, several Lords were ordered, by name, to be written to for that purpose.—*Lords Journals*, XI. 12, 27.

Case of the Earldom of Banbury, 1661.

issued to the Earl of Banbury. But instead of acquiescing in the exclusion, he immediately presented a petition to the King, in which he styled himself "Earl of Banbury," and representing the various creations of the late Earl; that he married Elizabeth, daughter of the Earl of Suffolk, and had issue by her, Edward, his eldest son, who died without issue, and the petitioner, who was born in January 1630 [1631], about a year and a half before the said Earl's death; that, "as son and heir of the said late Earl, he sat in the last Parliament as Earl of Banbury, as of right he might, and hath used and had all privileges as other Earls there; but having no writ of summons to this present Parliament from your Majesty, as other the Peers have, hath forborne to sit there, although he hath done nothing to deprive him of his title thereunto, nor, to his knowledge, to incur your Majesty's displeasure." He therefore prayed that a writ of summons might be issued to him as Earl of Banbury, and that he might "enjoy all the *precedency* and *privileges* thereunto belonging *granted by the letters patent* of that dignity[1]." The claim to the *precedency* granted to his father merits particular attention, because there are strong reasons for believing, that the hostility which a large body of Peers showed towards the Earl, arose from his insisting upon the place in the House, which the eight Earls who were interested in the question had relinquished in favour of the first Earl of Banbury, upon the express condition that it should be confined to himself *for his life only*.

If the Earl of Banbury did insist upon his precedency, in opposition to the resolution of the House in 1629, and to the agreement entered into by all the Peers affected by the special grant in the first Earl's favour, his prudence was little to be commended; but the circumstance tends

[1] *Printed Evidence*, pp. 43, 44.

Case of the Earldom of Banbury, 1661.

to show his conviction that his legitimacy, and consequently his right to the Earldom, could not be disputed. The claim naturally excited the jealousy of every Earl whose patent was dated between the 5th of February 1626, and the 18th of August 1627, namely, the Earls of Berkshire, Cleveland, Monmouth, Danby, Manchester, Mulgrave, and Marlborough, seven powerful and influential Peers, all of whom, except Lord Danby, were living in 1661[1], and had a *personal* motive for opposing it.

Lord Banbury's petition was referred to the House of Lords, and on being read on the 6th of June 1661, the Lord Chancellor stated, "that his Majesty had signified his pleasure to him that no writ should be issued out to summon the Earl of Banbury to this Parliament, upon some question that was made last Parliament in this House concerning him." The petition was referred to the Committee for Privileges, who were to hear counsel for the petitioner, and the Attorney-general on the behalf of the King, and to make their report to the House[2].

On the 10th of June 1661, the Committee for Privileges met, when the Earl of Banbury's petition was read, and counsel were heard on his behalf, who requested a week's time to produce witnesses, and the Committee adjourned until the 17th of that month. Two days before that day, namely, on the 15th of June, the Committee reported that the Earl of Banbury wished some witnesses to be examined on his behalf, among whom was the Countess of Salisbury, the sister of Lady Banbury, and the claimant's maternal aunt; and it was ordered that they should be summoned, and that the

[1] In 1693 only three of those titles existed; namely, the Earldoms of Berkshire, Mulgrave and Manchester; but the hostility of their ancestors to the claimant's right did not descend to all of their descendants, for two of the Peers who voted for calling in the Judges, and against the resolution negativing the petitioner's claim in 1693, were the Earls of Murgave and Manchester.

[2] *Printed Evidence*, p. 44.

Case of the Earldom of Banbury, 1661.

Attorney-general should attend the Committee on the following Monday[1].

The Committee met on Monday the 17th of June 1661; and the following imperfect memoranda of the proceedings were found among the records of the House of Lords, and contain all which is known of the evidence produced on the subject. Some explanatory notes are now added to the statements of the witnesses, whose evidence is so briefly reported as to be occasionally almost unintelligible.

"Munday, Jun. 17, 1661.

"Committee of Privileges.

"Earl of Banbury's Bill and Order read.

2° Caroli 1mi E. Banbury created[2]. Edw[3].

"Anne Delavill[4] saith she knoweth him[5] to be the son of Wm. E. of Banb., being at his birth.

"3 Jan. 1630[6], Nic. E. Banbury borne. Wm. dyed in 1632[7].

"She knoweth nothing but that he[8] was owned by the E. of Banbury as his son. She knows nothing but that he knew shee lay in.

"Did shee ly in publickly?

"All the house she was in knew it. She lay in at

[1] *Printed Evidence*, p. 57.

[2] This refers to the patent of creation of the Earldom.

[3] *i. e.* Edward, the eldest of the two sons. The next paragraph also evidently relates to him.

[4] This witness made a Deposition in Chancery, in 1641, wherein she stated that she was the wife of Francis Delavall, of Caversham, esq., and had the charge of the child, Edward, whilst he was at nurse in the Countess of Banbury's house. *Vide* antea, p. 311.

[5] *i. e.* Edward.

[6] *i. e.* 3rd January 1630–1631.

[7] William Earl of Banbury died on the 25th May 1632.

[8] The witness here clearly alludes to *Nicholas*, the *second* son, because she says she was not at his (Nicholas's) birth, though, when speaking of Edward, she said, both on that occasion and in her depositions in 1641, that she was at *his* (Edward's) birth.

Haraden, in North'tonshire. Haraden is L. Vaux's house.

"Did Wm. E. see the child?

"I was not there to know it. The lady was there before to take waters of Wellingborough, but whether at this time, I know not. I dare say a child was borne then of the lady. "All withdraw.

"Called in again.

"Who were godfathers, &c., Dalavil knows not.

"How old was Wm. E. of Banbury?

"Know not. He rod a hawking and hunting within ½ a yeare before his death & all other sports.

"Mary Ogden[1]: I know Nico' E. of Ban': he was borne a yeare & 4m before old E. dyed. I was at his birth. I was his nurse, but was not at his xt'ing, bec' I was not of their opinion[2]; I nursed him 15 months in the house at Haraden.

"Did Wm. E. ever see him?

"I know not.

"I know not whether Wm. E. knew his lady lay in, but he visited her.

"What was the child called?

"Nicolas, and was carried ordinarily up and downe the house.

"Did strangers see him?

"The household saw him.

"How know you that this petic'oner is the child you nursed?

"I have known him all along as well as my owne child.

"What was he called in his brother's life-time?

[1] This witness did not make a Deposition in 1641, probably because the proceedings on that occasion related to Edward only, of whose birth she may have known nothing.

[2] Meaning that she was not of their *religion*, Lady Banbury being a Roman-catholic.

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" Nicolas, I know nothing else.

" I never knew him called Nic. Vaux in my life.

" ANNE READ[1]:—I know he is the Lady Banbury's son borne in the begin'ing of Jan. 1630—his father died one yeare & ½ after.

" Did the E. of Ban. and his lady converse in bed together?

" Dalavil saith shee hath seene them often in bed together[2].

" Were you not enjoyned to conceal his birth?

" Answ. They know no cause of concealment.

" Q. Were you not cautious to keep the child secret?

" A. I was never commanded to keepe him secret.

" EDW. WILKINSON[3]:—I know the present E. he is the son of Wm. bec' he was 1 year ¼ old wn Wm. dyed[4]. I saw not the now Earle till after his father's death.

[1] This woman was probably the wife of Jerome Read, the Earl of Banbury's servant, who witnessed his will, and to whom he bequeathed 100 *l.*

[2] It is not certain whether this witness meant to repeat what Anne Delavall had told her, or that the question and answer belong to the examination of Mrs. Delavall, and have been misplaced by the person who took the notes; which conjecture is rendered more likely to be correct by the answer to the next question being in the *plural* number, " *they* know, &c." as if the statements in which all the witnesses agreed were thrown together, instead of being repeated under each name.

[3] This witness was not examined in 1641. He was a trustee in the settlement of the Earl of Banbury's property in April 1631, and was a party to the indenture of Lord Vaux and the Countess of Banbury, relative to the mortgage of Caversham, in July 1632, when he was described of " Bucton, in Northamptonshire, gentleman." *Vide* p. 308. *antea*

[4] It has been observed, that this statement " does not agree with the real date of Nicholas's birth:" but the apparent discrepancy arose, as has been already observed, from computing the year from the 25th of March, instead of from the 1st of January. As Nicholas was born on the 3rd of January 1631, and as the Earl died on the 25th of May 1632, he must have been one year, four months and twenty-one days old, at that event, which agrees very nearly with the date mentioned by Mary Ogden. Ann Read says, he was " one year and a half old" at his father's decease, which Nicholas himself stated in his petition in 1661.

"What was this Nicolas called at his father's death?

"He was called Nicolas Knowles, w^t^ should they call him else.

"The Earle and his Lady agreed very well together.

"I know not that the E. W^m^. did know that he left any issue."

Upon this evidence some observations are necessary, in consequence of the remarks which were made on it during the last claim to the Earldom of Banbury.

It is obvious that the first inquiry related to the birth of Edward the elder son, who was then dead and had left no issue, and that it was not pursued after the positive testimony of Anne Delavall, that "she knew him to be the son of the Earl, as she was at his birth." The subsequent examination referred exclusively to Nicholas, the claimant. Anne Delavall swore that she knew nothing about him, except that he was owned by the late Earl as his son, and that his mother lay in at Lord Vaux's house at Harrowden, in Northamptonshire, to which she had once before gone to take the waters at Wellingborough, which place is close to Harrowden. This witness attended upon the person of the Countess of Banbury for thirteen years, a situation perfectly compatible with the respectable station in life which she seems to have filled, as she describes her husband, who corroborated her testimony in 1641, as an "esquire." Much odium was thrown upon her testimony during the last proceedings before the House of Lords; but the justice of the comments which were then made upon it, is by no means apparent. Lord Redesdale described her as "a feeble auxiliary, whose answers betray a consciousness of guilt and a dread of detection not easily paralleled!;" and not satisfied with casting suspicion upon her motives, his

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Lordship boldly accused her of perjury. "Like false witnesses in general," he said, "she denies all knowledge of every thing except the circumstance she is brought forward to prove. When she is asked whether Lord Banbury saw the child, a fact of which it was impossible for her to be ignorant, she says she was not there to know it. There is not one of her answers which does not admit of a double interpretation, and is not equivocating and evasive." The evidence of all the witnesses is very imperfectly recorded; but there is no ground for the character which the noble Lord has given of her testimony. So far from denying all knowledge of every thing except the circumstance which she was brought forward to prove, she stated *nothing conclusive* upon *the point at issue*, the birth of Nicholas. The obvious meaning of her answer to the question, "Did the Earl see the child?—I was not there to know it," is, that she was not at Harrowden when he was born. How then could his birth be "a fact of which it was impossible for her to be ignorant?" All which she knew was, that the Countess lay in at Lord Vaux's house at Harrowden, which might have been within her knowledge; and that the Earl had "owned" the child, which recognition might have occurred in her presence some time after its birth. The christening, according to the usage of the time, most likely followed that event at the distance of one or two days only; and her not knowing who were the child's sponsors, agrees with her assertion that she was absent when it was born. Moreover, when asked, "if the Countess lay in in public?" she replied, "All the house she was in knew it;" the fair inference from which is, that she spoke of persons of whom she was not one, and of a place at which she was not herself present. So far from swearing to every thing likely to support the claim of Nicholas, she displayed that caution in her

replies which would be shewn by a witness who was desirous of speaking no more than the truth; and it is only just to compare her evidence with her deposition in 1641 [1]. The Depositions in that year related to Edward only, and her statement respecting him perfectly agrees with what she said in 1661. Instead of swearing to the same effect respecting Nicholas as she had done in reference to Edward, she explicitly said that she knew nothing whatever about him, except that he was owned by the late Earl as his son. If she was "a perjured witness, wholly unworthy of credit, and was brought forward to establish that which had no foundation in fact," would not her testimony have been as conclusive respecting Nicholas as it was respecting Edward? Would she have professed ignorance of every material fact as to Nicholas's birth, instead of saying that she knew nothing except that Lady Banbury lay in? A suborned witness, unrestrained by conscience, and regardless of truth, would have been explicit in facts, and minute in details, to *prove* that Nicholas was the son of the Earl; but she properly confined her evidence to what she knew of her own knowledge. If her statements be compared with those of the other witnesses, or with her own deposition in 1641, they will be found strictly consistent; and there is nothing to shake her credit, or to cast the slightest suspicion upon her veracity. She attempted to prove nothing which a confidential servant of the family was not likely to have seen or heard, and she carefully refrained from making any statement upon mere hearsay or presumption. If, therefore, Anne Delavall's evidence be considered dispassionately, and without prejudice, it will be found to have been most undeservedly characterized by Lord Redesdale, who evidently believed, but without the slightest proof, that she was present at Nicholas's birth, and that

[1] *Vide* p. 311, antea.

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she was anxious to conceal the fact from the Committee. All which her statements prove is, that the Earl of Banbury had recognised or "owned" the child to be his son; that in her belief it was born at Lord Vaux's house at Harrowden, in Northamptonshire; and that Lord Banbury was capable of riding on horseback, and of enjoying all field sports for several months after the birth of the child. According to the testimony of another witness, (if, which is not impossible, she did not herself say so[1]) Mrs. Delavall had seen the Earl and his wife "often in bed together."

It does not necessarily follow from the circumstance of Lady Banbury's having been confined at Lord Vaux's house, that she was guilty of adultery with that nobleman. Lord Vaux was the intimate friend of Lord Banbury up to so late a period as November 1629, when he was a party to a deed by which the Earl settled his landed property upon the Countess in the event of her surviving him, his motive for which was expressly said to have been, that "*she had been always unto him a good and loving wife.*" If Lady Banbury's health rendered it desirable that she should take the waters of Wellingborough, there is nothing suspicious in her residing, during her stay, at the mansion of her husband's most intimate friend; or even that her confinement should have taken place in his house; for that event might have been hastened by accident, or her health might have rendered her removal dangerous, if not impossible. Either of these causes would satisfactorily explain the circumstance; and there is *no proof, that Lord* Vaux was *present,* or that Lord Banbury was *absent* on the occasion, the natural presumption being that her husband was present. If then, as in the absence of evidence to the contrary ought to be inferred, Lord Banbury was at Lord Vaux's house when his wife was

[1] *See* Note [2], p. 332, *antea.*

confined, there is an end of the suspicion which the place of her accouchement has created.

The next witness was Mary Ogden, who was Nicholas's nurse, and there is not a word in her evidence to justify the idea of her having stated any thing which she did not *know* to be *true*. She said that she was at his birth, and mentioned the date of that event with the greatest accuracy; but she observed that she was "*not* at his *christening, because she was not of their opinion,*" by which she evidently meant, that she was not of their *religion,* Lady Banbury being a Roman Catholic [1]. She nursed Nicholas fifteen months at Harrowden, which, for any thing that appears to the contrary, might have been *after the Earl's death,* and *when his mother was the wife of Lord Vaux.* Ogden did not know whether the Earl ever saw him, or whether he knew of his wife's confinement, though he "*visited* her," which visits may have been made during her confinement; and if so, it would explain the reason of the witness's adding to her remark, that "she knew not whether the Earl knew his wife lay in," "but he visited her;" meaning, perhaps, that *because* he *visited her,* he *must have been aware of the circumstance.* "The child," she added, "was ordinarily carried up and down the house;" and to the question, "whether strangers saw him?" she replied that "the household did so," as proof that there was no concealment. The last part of her evidence related to the identity of the claimant as the child which she had nursed, to which she *swore positively*; and added, that though she had known him from his birth up to that time as well as her own child, yet she never knew him to be called Nicholas Vaux. Lord Redesdale commented with the same severity upon this witness as upon the preceding one; and inferred, from her statement that she knew not whether Lord Banbury ever saw the child, "that no one

[1] *Vide* p. 320, antea.

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after this could doubt the fraud that had been practised upon Lord Banbury," an inference unwarranted by the premises, it not being even proved that the witness nursed the infant during any part of Lord Banbury's lifetime. Even if, as is certainly probable, the fifteen months during which she nursed Nicholas at Harrowden were those which immediately followed his birth, her ignorance whether the Earl ever saw the child, might have arisen from several causes unconnected with a design to conceal the infant from him. Of such concealment there is not only no shadow of *proof*, but the *presumption* of it is directly rebutted by the evidence of Mrs. Delavall, who swore that the Earl had "*owned* him as his son," and by that of Anne Read, who deposed that she knew no cause of concealment, and had never been ordered to keep him secret. If indeed these witnesses had sworn positively that the Earl never did see the child, or if that fact had been established by other evidence, still the testimony of another witness to the contrary would, if they were equally worthy of credit, have left the point open. Ignorance of the fact in one witness, is met by positive proof of recognition by another; and it is material to observe, that if the Earl of Banbury was not at Harrowden when Lady Banbury was delivered of Nicholas, it by no means follows because he had "owned" the child to be his son, that he must, as a matter of course, have *seen* it. He may have known that his wife was pregnant, that she was confined at Harrowden, and that she was delivered of a boy; and on hearing of the event he may have so expressed himself, both at the time and subsequently, as to justify Mrs. Delavall in stating, of her own knowledge, that the Earl had "owned" him as his son, a declaration which may have been casually made in her presence.

Anne Read, the third witness, does not state in what relation she stood to Lady Banbury, but she was probably one of her servants. She merely deposed that the

claimant was Lady Banbury's son, that he was born in the beginning of January 1630 [1631], that Lord Banbury died one year and a half after his birth; that Mrs. Delavall said that she had often seen the Earl and Countess in bed together, that she knew no cause for concealing Nicholas's birth, and that she was never commanded to keep him secret.

Edward Wilkinson, the fourth and last witness, said that he knew the claimant, but never saw him until after his father, the late Earl's, death; that he was always called Nicholas Knollys; and asked, as if surprised at the question put to him, "What should they call him else?" He deposed to that, which is evident from the Earl's settlement of his estates in November 1629, from his will in November 1630, and from every other act of his life,—that he and his wife lived on affectionate terms with each other; but added, that he was not aware that the Earl knew that he left any issue.

The last two witnesses, whose evidence contains little of consequence, and affords no matter for suspicion, fell also under Lord Redesdale's censure. He describes them as "worthy of their companions," as if they were all a set of suborned persons involved in a general conspiracy, and bound together by one common interest to commit gross perjury. There is no cause to believe that the Committee before which they appeared in 1661 took that view of their testimony. The Attorney-general is not stated to have expressed any doubt of their integrity; and as they had clearly established that the claimant was born in wedlock; that the Earl could have had, and probably did have, access to his wife, at a time when he might have been the father; as there was no proof of impotency on his part, and none of adultery on her's, the legal status of the claimant was too firmly established to be shaken by any circumstance whatever. Neither the claimant's aunt, Lady Salisbury, nor any other witness was called,

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because none were necessary, as their testimony would only have supported a fact which needed no corroboration; and the same reason will explain why no other member of the family was examined.

If the Lords' Committee entertained any suspicion of the veracity of these witnesses, or doubted the facts to which they deposed, why were not persons brought forward to contradict them? The Attorney-general could have had no difficulty in rebutting their testimony if it had been susceptible of contradiction, and of proving by a host of living witnesses that the two children had been concealed, if such were the case; even, if he could not have brought forward conclusive evidence of their having been always considered the fruit of a criminal connexion between their mother and Lord Vaux. The witnesses left the bar of the House, unimpeached and uncontradicted; yet at the distance of a century and a half, a noble Lord ventured to impute gross perjury and collusion to four persons, whose testimony had not been shaken by the cross-examination of the law officer of the Crown, and upon whose evidence the Committee were satisfied of the claimant's right.

Lord Banbury's counsel submitted that they had cleared the title of their client, and prayed that he might enjoy the dignity and privileges of a Peer. It seems that the Law was held to be so clear, as only to render it necessary to refer to Lord Coke's definition of it, in his First Institute, 244, that "legitimacy is not to be disputed if the father be within the four seas," even, they added, "though the wife be in adultery[1]."

[1] "Counc.—We have cleared the title. Pray he may enjoy the liberty & priviledge of a Peere.

"Cooke 1 Inst. 244. not to be disputed whether son or no, if father be within ye 4 seas though wife be adultery.

"Mr. Attorney p' Rege, confesses the law cleare, the case is the King's not sending a writt by reason of his father being reputed childles. You

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The Attorney-general on the part of the Crown confessed that "*the law was clear*," by which he did not, it is presumed, mean merely that the law was what the claimant's counsel contended, simply because Lord Coke had so defined it; but that such was universally the manner in which the law was then understood by the profession; and a reference to earlier, as well as to contemporary, authorities will show that it was impossible for him to have entertained a different opinion. After making this admission the Attorney-general proceeded to state the reasons which prevented the issue of the writ of summons to the claimant, more, it would seem, in justification of that measure, than with any hope or expectation of inducing the Committee to come to a resolution against him. Those reasons were, that the late Earl was reputed childless, that Lady Paget and Lady Willoughby had been found his heirs, that the lands of the Earl were settled upon him by Lord Vaux, and that the first inquisition could not be avoided without a traverse or writ "de melius inquirendum."

The Committee came to the resolution of reporting "the matter of fact," that "according to the law of the land he is legitimate;" but this report was altered before it was presented to the House, probably because it was calculated to raise a doubt between the law and the fact, and because it seemed to presume a distinction

have heared circumstances, (after death) of W^{m}, Lady Paget & Lady Willoughby found his heyres. This seconded by an order of the House. The order read & both sides agree to the Office, & the land she now hath were the Lord Vauxes settled by conveyance. The first Office cannot be avoided wthout a traverse or melius inquirend^{m}.

"All withdraw.

"Ordered to report the matter of fact.

"That according to the Law of the Land he is legitimate.

"Adj^{d} till Saturd' next 3 o'c.

"The report made to the House the 1st of July 1661 that the opinion of the Committee is that the Nicholas E. of Banbury is a legitimate person.

"Ordered to heare all parties at the barr on Munday next."

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between " legitimacy" and " legitimacy in law," as if there could be any other species of legitimacy than what is created by, and depends upon, the law of the land. The report was therefore corrected, and on the 1st of July 1661 the Committee reported it to be their opinion, " that Nicholas Earl of Banbury *is a legitimate person.*"

Before tracing the proceedings farther, it is necessary to advert, at some length, to the objections taken by the Attorney-general to issuing a writ of summons in 1661, as well as to those additional objections to the claim which were urged in the House of Lords on the last occasion when it was brought forward.

First, That the Earl of Banbury was reputed Childless.

The supposition that the Earl of Banbury was childless arose from the King's message to the House of Lords in 1628, on the question of precedency. It has only recently been ascertained, that the right then claimed by the Crown, to grant a higher precedency to a Peer than would belong to the date of his creation, had often been exercised by the Crown, as an undoubted branch of the royal prerogative, as well before, as very soon after, the statute 31 Hen. VIII. " for placing the Lords " was passed; that no question was ever raised on the point, until the case of the Earl of Banbury; that it is extremely doubtful if the said statute did control the power of the Crown in granting precedency, though it has been so considered by Lord Coke and the House of Lords; that notwithstanding Charles the First's promise to the House, in the instance of Lord Banbury, never again to grant a similar precedency, he made another grant of the same kind within a fortnight after that promise; that he again did so in the year 1640; and that some years afterwards, in granting precedency to the Duchess of Dudley and her

daughters, the patent states in express terms that it is the King's "prerogative royal" to confer precedency, "which he would not have drawn into dispute," and it forbids any disturbance being offered to the grantees, "on pain of the King's displeasure, and as they will answer the contempt thereof at their perils." These facts show the anxiety of the Crown to support its prerogative of conferring precedency by every means in its power, and render it highly probable that any excuse would be used to prevent the King from recalling a grant of that nature. In the case of Sir William Howard, who was created Baron Stafford in 1640, with the precedency which was enjoyed by Henry the late Lord Stafford, the House again remonstrated, and the King terminated the controversy by immediately creating Lord Stafford a Viscount; whilst in the case of Lord Banbury, he induced the House to yield, on the pretence that the Earl was "old and childless," so that his Majesty carried his point in both instances. The statement to the House in March 1628 that Lord Banbury was then "old and childless," has been considered inconsistent with the Earl's knowledge of the existence of the children of whom he is supposed to have been the father; and this fact operated as strongly against the claimant in 1811 as any other circumstance connected with the case. But the following observations will, it is presumed, weaken, if they do not destroy, the inferences which have been drawn from it.

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The patent granting the Earldom of Banbury and the disputed precedency is dated on the 18th of August 1626. Edward, the eldest of the Earl's children, was not born until the 10th of April 1627; so that at the time when the precedency was conferred the Earl *was* "*childless*," and he continued to be so for nearly eight months afterwards. The King's Ministers and the other

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Peers might not have heard of the birth of the infant; and the Royal message may consequently have proceeded from a mistake, which the House had not the information to correct. The debate which occasioned that message took place towards the end of March 1628, when Edward was about eleven months old; and it has been contended that the Earl of Banbury concurred in the King's representation of his being childless, by taking his seat shortly afterwards, and that such concurrence, if he was aware of the statement being untrue, "would have been a fraud of the deepest die[1]." But when all the facts are considered, Lord Banbury's conduct may be satisfactorily explained, if not justified. He was at that time eighty-two years of age, a period of life at which precedency over eight or nine Earls could not have been to him a matter of much importance, and when the mental energies are rarely vigorous enough for actions of an unusual, if not perilous nature. The *controversy* was *not between Lord Banbury* and *the House of Lords*, but *between* the *Crown* and the *House*, upon a question of *prerogative*. Charles the First's tenacity upon that point is matter of history; and there are many examples of his not being very scrupulous about the means by which he carried his object. Rather than yield on this occasion, the King condescended to support his grant by a representation, of the want of truth of which, he may not have been aware, and by a solemn promise, which he violated within fourteen days; which he again violated in 1640; and again, in a more deliberate manner, in 1644. The Earl of Banbury did not *dictate*, and was *no party* to the King's message. It was probably sent without his being cognizant of its contents: he was certainly not present when it was delivered; and when the manners of the times,

[1] *Vide* Lord Eldon's speech, postea.

and the deference which was shown to the King, especially by those who were objects of the Royal favour, are remembered, it cannot be expected that a man, upwards of eighty years of age, should have taken so decided and dangerous a step as to *prove* to the *House of Lords* and the *world* that his *Sovereign* had stated a *falsehood*; that he should strike from under the King the ground on which he stood in support of his prerogative; or that he should re-open a dispute between the King and the House of Lords upon a point of such peculiar tenderness, that it might have led to most serious results. Lord Banbury was not the *author of the statement*; and it may fairly be urged that he was not called upon to contradict it, more especially, as the House determined that the precedency should not be enjoyed "*by his heirs,*" which resolution rendered it *wholly unimportant* to the subject in dispute *whether he had issue or not.*

The extreme care manifested by the Peers whose rights were affected, to prevent the privilege from descending to Lord Banbury's heirs is remarkable, as it tends to show, either that they were *aware* that he was *not childless,* or that they thought it probable he might not die so. The King requested that, "considering how old a man this Lord is, and childless, he may enjoy it during his time;" but the Earls who were interested in the question, when they severally gave their consent to his Majesty's request, added, "*during his life,*" or "to his person *only during his life,*" or, "for his *own life only*;" and the order of the House was, that "the Earl may hold the same place as he now stands entered, *for his life only,* and that place of precedency *not to go to his heirs.*" *No other heir* than the issue male of his own body *could inherit* his honours, so that this proviso must have contemplated the existence of, and was *purposely* made to exclude, *his children.*

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Whether Lord Banbury did or did not know of the existence of Edward in March 1628, no inference can be drawn from his conduct respecting him, *against* the *legitimacy* of *Nicholas*, the *second* son, the claimant in 1661, *because he was not born until two years and ten months afterwards.* A child may be born in wedlock, and yet from the absence, or temporary impotency of the husband, it may be illegitimate, as well *de jure* as *de facto*, whilst *another* child, born one year or more afterwards, may have been *actually* procreated by him. So far as physical power is in question, a man may be incapable of procreation from illness and debility in January, and yet be fully capable in March. In advanced age occurrences of this kind are not uncommon. Before the generative functions are altogether extinct, nature sometimes rallies, and concentrating, as it were, all her potency for one final effort, the result is not unfrequently successful; and by almost the last act of nuptial intercourse, an old man sometimes perpetuates himself by the creation of an heir to his fortune.

Much has been said against the probability of a man of eighty-four begetting a child; and though the objection to the legitimacy of Nicholas Knollys on that ground was answered and rejected by Lord Eldon, because the law knows no period of life at which a man ceases to possess the power of procreation, and because instances might be adduced of men even ninety years old and upwards having had issue, it is nevertheless certain that the age of the Earl operated very strongly against the claimant. If the strict principles of law are not rigidly adhered to, and if rules which ought to be inflexible are departed from to meet any particular case of *probability*, the greatest possible confusion with respect to property must ensue. It is not necessary to adduce the instances in which men at a very advanced

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period of life have become fathers, for such cases will occur to every one, not merely as historical facts, but within their own knowledge. One example may, however, be mentioned, because the issue now holds the highest rank in the British Peerage. A noble Duke married early in life, but had no children during a cohabitation of nearly forty years. He married a second wife, a lady of the purest character, eight days only after the death of his Duchess, at which time he was in his seventy-first year. At the expiration of seven years, he became the father of a daughter; and two years afterwards, when he was in his eightieth year, of a son, who now enjoys his father's honours.

But if *probability* be allowed to enter into the consideration of such cases, it was almost as improbable that Lady Banbury should have been the mother of Nicholas Knollys, as that Lord Banbury should have been his father. In January 1631, she was between forty-four and forty-five years of age; and the cases are by no means numerous in which a woman of forty-four[1] becomes a mother; yet no *rational* doubt has ever

[1] Dr. Paris says, "In this climate, the most usual period of women ceasing to bear children is between forty-four and fifty, and although we have, in ancient as well as in modern times, many extraordinary examples of protracted fecundity, but little credit ought in general to be attached to them. Marsa, a Venetian physician, relates a case of a woman who, at the age of sixty, brought forth a daughter, and suckled her, and whom he had previously treated for what he had considered to be ovarian dropsy; the annals of our own country would furnish some extraordinary instances of a similar kind. Dr. Gordon Smith illustrates the subject by the case of the wife of a peruke-maker in Poland-street, in the year 1775, who, at the age of fifty-four, produced two sons and a daughter, although she had been married for thirty years, and had never before been pregnant.—*Medical Jurisprudence*, vol. I. p. 258.

A very remarkable fact is stated in a manuscript note of the late Francis Townsend, esq., Windsor Herald, in his copy of the evidence in the Banbury Case: The Rev. Dr. Rose, late of Merchant Tailors' school, says, his mother was forty-six when she married, and that she had thirteen children,

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existed that Lady Banbury was the mother of Nicholas Knollys.

It has indeed been lately suggested by Mr. Beltz, Lancaster Herald[1], whose talents and professional experience entitle his remarks to attention, that Edward and Nicholas Knollys were not the children of the Countess of Banbury, but of "Edward Lord Vaux by some other woman or women;" and the grounds upon which this novel and extraordinary hypothesis is founded are the following, all of which proceed upon the *supposed certainty* that the children *were not begotten by Lord Banbury*; so that Mr. Beltz, like the other opponents of the claim, commences his argument by assuming, in limine, that the *whole point at issue has been proved.*

I. *The age of the Countess.* "It is pretended that "she was delivered of Edward in **1627**, when she "was at least 44, and of Nicholas in January "**1630–31**, when she was 48. Although instances "of pregnancy at that period are not infrequent "in women who have been in the habit of child "bearing; yet it is most extraordinary that a "woman should *begin* to bear children at that "advanced age."

whereof he is one." The following case, which has been recently discovered, is stated in a pamphlet lately printed by Colonel Knollys, the present claimant to the Earldom of Banbury. In the parish of Ashwell, in Herefordshire, a farmer's daughter was christened on the 19th of September 1790, at which time she is supposed to have been above a year old. She married on the 12th of October 1823, and on the 16th of January 1835 was delivered of a child, never having been pregnant before. She must therefore have been in her forty-fifth or forty-sixth year when her child was born, and had then been married above eleven years.

[1] Postscript to "*A Review of the Chandos Peerage Case*, by George Frederick Beltz, esq., Lancaster Herald," 8vo. 1834. Mr. Beltz seems to have been employed in collecting evidence against the claim to the Earldom of Banbury, and was examined at the bar of the House of Lords, in May 1810. *Vide* the *Printed Evidence* p. 241.

The age of the Countess is here mistaken. She was under forty-one, instead of being forty-four, when Edward was born, and was between *forty-four* and *forty-five, instead of forty-eight,* when she gave birth to Nicholas[1]. So far from Lady Banbury not having begun to bear children until the year **1627**, it has been shown that she gave birth to a daughter, who died before **1610**[2]; and she may have had many other children who died infants.

II. *The names of the children.* "It is most improba-
" ble, that to children born of the Countess under
" such circumstances (when the prospective idea
" of deceiving the world as to the genuineness of
" their birth, must have been formed by the adul-
" terers), names should have been given entirely
" unknown in the Knollys family, and common in
" that of Vaux. This inference is founded upon
" the constant observation, that the general prac-
" tice in ancient as well as modern families has
" been to adopt especial Christian names."

The baptismal names alluded to are those of *Edward* and *Nicholas,* one of which names at least *was not* "*common*" in the pedigree of Vaux, for Edward Lord Vaux appears to have been the first of his family who bore it. But whilst it has been assumed that Edward Knollys was called after Lord Vaux, it has been forgotten that Lady Banbury had a brother of the name of *Edward,* namely, Edward Lord Howard of Escrick, who is shown, by the settlements before recited, to have been on very friendly terms with his sister, and her husband. If then, as would be inferred in any case into which prejudice and suspicion had not entered, the facts were, that *Edward* Knollys was called

[1] *Vide* p. 293, antea.
[2] *Vide* p. 306, antea.

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after his *uncle,* and perhaps godfather, Lord Howard; and that Nicholas Knollys was the godson of Lord Vaux, the *intimate friend* of *Lord Banbury,* and was named by him after one of his own ancestors, instead of himself, because his own baptismal name of *Edward* had been already given to the elder son, from respect to his maternal uncle, there would at once be an end of the mystery which has been thrown round the circumstance. Hence, supposing that the names of "Edward" and "Nicholas" were unknown in the Knollys family, the above explanation would satisfactorily account for their adoption; and, as has been before remarked, there is nothing to show, that Lord and Lady Banbury had not other children besides a daughter, between 1610 and 1627, who died young, and who may have borne the baptismal names of William, or Francis, or Robert, or any other name common in their father's family. That nothing, however, may be wanting to show the fallacy of the argument founded upon the names of these children, it must be observed that the baptismal name of *Nicholas* appears to have occurred before in the Knollys family, and that it was not common in that of Vaux [1].

[1] Among the persons who fled from England upon the accession of Queen Mary in 1553, on the revival of the Roman Catholic religion, and the enforcement of the penal laws against heretics, who took refuge at Geneva, and who are recorded in the "*Livre des Anglois à Genèva,*" printed by Mr. Southerden Burn, were,

"Thomas Knolles the eldist, ... his wife, Michael and *Nicholas* "his . . . . . ."

To these names the editor of the tract had added the following note:— "Q. as to these persons. Perhaps the Christian name of one of them may be erroneous, for Sir *Francis* Knollys [*the father of William Earl of Banbury*] was an exile at Frankfort, and left that place with Knox and Whittingham for Geneva," p. 9. It is unlikely that the blank after "Nicholas" should be filled with the word *servants,* instead of *sons,* because the *surname* of neither of them occurs. It is, however, doubtful if the above-mentioned Thomas Knollys was Sir Francis Knollys, because in another part of the tract the names of Thomas Knollys and *Joan* his wife occur (p. 6), the name of the wife of Sir Francis Knollys being *Katherine.*

With respect to the baptismal name of *Nicholas* in the *Vaux* family, it has

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III. "*The strong improbability, not to say impossi-*
"*bility, that the Countess could have been pregnant*
"*and delivered of children, at the different times*
"*stated, without the knowledge of the Earl,* is
"founded upon the following facts:

1. "That the presence of the Countess, during
"the latter years of the Earl's life, appears to have
"been constantly necessary, and in fact called for in
"the different conveyances of the property; *e. g. as*
"*to Nicholas.* The fine for passing Cholcey was
"levied within fifteen days after St. Martin, in the
"6th year of Charles I.; that is, towards the latter
"end of November (St. Martin's day being on the
"11th) 1630, when the Countess, according to the
"alleged date of the birth of Nicholas, on the 3rd
"January following, (1630–1) must have been
"within five or six weeks of her delivery of that
"son. She must have been personally present at
"the passing of the fine; and it is not to be sup-
"posed that the advanced state of her pregnancy
"could have been concealed from the Earl her
"husband."

It was certainly *impossible* for the Countess to have been pregnant in November 1630, without the knowledge of the Earl; and if, as every person, (except Mr. Beltz), believes, Lady Banbury *was the mother* of the two children, the fact alluded to tends to establish not only the *de jure,* but the *de facto* paternity of the child; because it proves, that although *the Earl must have been aware of his wife's situation,* he did not accuse her of adultery,

not been found in any instance in the documents and records which have been lately most carefully examined, for the purpose of investigating the pedigree of Vaux, after the death of Nicholas the first Lord Vaux, in 1523; though in a pedigree in the *Harleian MS.*, 1073, a *Nicholas* Vaux, uncle of Edward Lord Vaux, is introduced, the correctness of which statement is however very doubtful.

or repudiate her infant; nor was his affection for, and confidence in her, at all lessened by the circumstance.

2. " That the Earl was totally ignorant of the " pregnancy and delivery; which is demonstrable " from all his acts, and particularly from the public " testimony which he gave of her affectionate con- " duct towards him in the deed, dated 3rd Nov. " 1629, (when Edward would have been two-and- " a-half years old), in which he declares that she " had always '*been unto him a good and loving wife*;' " — a spontaneous encomium which he would not " have passed upon her had he then had the small- " est suspicion of her adulterous intercourse, and " of its spurious result."

It is by no means demonstrable from all the Earl's acts that he was ignorant of his wife's pregnancy and delivery; and *if the Countess was the mother* of the children, Mr. Beltz's own argument shows that the Earl must have been aware of her being pregnant with the child whose legitimacy was disputed in 1661. The proofs which Lord Banbury gave of his entire confidence in, and of his great affection for his wife, are almost conclusive *evidence* that *he did not believe her to have been guilty of infidelity*; and if, as seems beyond a doubt, she had one child living at the time when he gave the "public testimony" of her affectionate conduct above mentioned, and that she was *pregnant with another*, when he again evinced his esteem for her in his will, wherein he called her his "*dearly beloved wife*," these "spontaneous encomiums" are strong *moral* as well as *legal* evidence, that he believed himself to be the father of both her children.

IV. " *The natural feelings of a mother*, which gene- " rally act more strongly, soon after the birth of a " child, at an age when further offspring cannot be

" expected, preclude our belief that Nicholas was " the issue of her body. Yet, two months after " such alleged birth of Nicholas, at Harrowden, had " scarcely elapsed before she executed the convey- " ance, which passed her life interest in Rotherfield " Greys to her husband's nephew Sir Robert " Knollys, and thus involved her new-born infant, " as well as her former issue, in the same act of " dis-inherison."

The argument founded on the alienation of Rotherfield Greys will be afterwards noticed; but if, as may be inferred from the mortgage of Caversham, the Earl of Banbury was in pecuniary difficulties, the alienation of Rotherfield Greys and his other lands is at once accounted for, and may have been *imperatively necessary*.

V. " *The protracted concealment of the children, long* " *after the cause for such concealment had ceased.* " William Earl of Banbury died 25th May 1632; " and it appears that, immediately afterwards, the " Countess intermarried with Lord Vaux; but that " her proper description under this new connexion " was concealed from the feodary who made the " return to the inquisitio post mortem, and omitted " also in the jurat and grant of the probate of the " Earl's will on the 2nd July following, wherein she " is described simply as his relict. On that very " day, however, she executed a conveyance of the " mansion and demesne lands of Caversham, of " which she was seised in fee, to Lord Harrowden, " Edward Wilkinson (one of the witnesses before " the Committee of Privileges in 1661) and others; " she being described in that conveyance as *the wife* " *of Lord Vaux.* Now Edward, the elder of the " two children, was not produced until *nine* years, " and Nicholas, the younger, was never, by name,

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" heard of until *fourteen* years, after that marriage.
" Had these children been the children of the
" Countess, either genuine or spurious, what reason
" could Lord Vaux and his wife have had for with-
" holding them from the knowledge of the world?
" We may fairly ask, where were they during the
" time of concealment from **1632** to **1641**? were
" they under the care of their respective mothers?

" As to the objection against such an hypothesis,
" namely, that in the deed of **1646**, in the presence
" of Lord Vaux and the Countess his wife, Nicholas
" is described as *son of the Countess,* it may be thus
" answered:

" **1.** That she was under the influence of her
" husband, Lord Vaux, and, for reasons now un-
" known to us, may have consented to this, not
" unprecedented, adoption of the illegitimate off-
" spring of that husband.

" **2.** That the designation of Nicholas, in that
" deed, as the son of the Countess, may have been
" introduced by the drawer of the instrument, as
" another mode of identifying a being, the doubt-
" fulness of whose birth had subjected him to dif-
" ferent descriptions. And,

" **3.** In the deed of **1646**, Nicholas is thus de-
" scribed: 'Nicholas, now Earl of Banbury, son of
" the said Countess of Banbury, heretofore called
" Nicholas Vaux, or by whichsoever of the said
" names or descriptions, or any other name or de-
" scription the said Nicholas be, or hath been called,
" reputed or known.'

" Is it presumptuous to suppose that, among
" those other names here alluded to but not stated,
" was the name of the *real* mother of Nicholas,
" which, with the acquiescence of the Countess, it
" was the object of Lord Vaux to conceal?"

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Although measures are not now known to have been taken for establishing the rights of Edward until 1641, yet so far from there being *proof* that either he or his brother *was ever concealed*, two witnesses swore, in 1661, that no order had been given to conceal them. Nor is there the slightest positive evidence that they were not considered the children of Lord Banbury. Little stress ought to be laid upon the fact that Lady Banbury's second marriage is not mentioned in the jurat and grant of the probate of the Earl's will, or in the first Inquisition of 1633, for the second marriage is not even stated in the *second* Inquisition, in 1641, nine years after she became the wife of Lord Vaux, the reasons for which may have been that she held a *higher rank* as the *widow* of an *Earl* than as the *wife* of a *Baron*; and the title of Countess of Banbury continued to be the usual designation by which she was always described in the proceedings in Parliament[1], as well as in every instrument to which she was a party. Moreover, a feme covert might be an executrix, and it was not necessary to name her husband; nor could he be joined in the probate. When it was necessary to describe her as a married woman, as in the conveyance of Caversham, and in the settlement of Lord Vaux's property upon Nicholas, she *was* called "Elizabeth Countess of Banbury, late wife of the late Right Honourable William Earl of Banbury, and now the *wife of Edward Vaux Lord Harrowden.*" It is not just to infer that Edward was *not produced before* 1641, because measures were not taken for superseding the finding of the Inquisition of 1633, until that year; or to say that Nicholas was not heard of "by name" until fourteen years after his mother's marriage, because no records or deeds are extant to prove the contrary. It is *easy* to *put* questions founded upon

[1] *Vide* pp. 320, 321, antea.

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mere *assumptions*, and to argue from those assumptions as if they had been established by evidence; but the practice is alike inconsistent with the principles of reasoning, and of jurisprudence. The idea that Lady Banbury was base enough to palm upon the world, *as the issue of her deceased husband*, two *bastard* children *of her existing husband*, of which *she was not the mother*, is utterly incredible, because there is a total absence of those motives which prompt individuals to guilt, namely, personal affection, or personal interest. Mr. Beltz's suggestion did not enter the imagination of the Peers who were contemporary with the birth of the children, and who opposed Nicholas' claim under the impression that they were *Lady Banbury*'s children *by Lord Vaux*. Even the Bill for declaring Nicholas illegitimate, instead of insinuating that the children were not the issue of Lady Banbury, expressly states, that the "*Countess during her coverture and intermarriage with the Earl had issue of her body, Edward and Nicholas.*" Whatever suspicion may have been entertained of the testimony of the deponents in 1641, and of the four witnesses in 1661, so far as the *paternity* of the children was in question. not a doubt has ever existed of the veracity of those persons with respect to their *maternity*. Nicholas is called, and must have been *described by Lady Banbury*, as *her* "youngest son" in the licence to go abroad in 1641; and in the settlement of Lord Vaux's property upon him in 1646, to which Lady Banbury was a party, he was styled "*son* of the *said Countess of Banbury.*" The supposition that the description in the deed in question "may have been introduced by the drawer of the instrument, as another mode of identifying a being, the doubtfulness of whose birth," &c. is not deserving of refutation. Moreover, if it could for a moment be believed that Lady

Banbury was induced, from the influence of Lord Vaux, to lend herself to the nefarious scheme of adopting two of *his* natural children by *another woman* as *her own*, is it likely that her brother, Lord Howard of Escrick, or her sister, Lady Salisbury, or her brother-in-law, the Earl of Salisbury, would have been equally accommodating? They might, indeed, have assisted in a measure to provide for *her* child, whether legitimate or illegitimate, but what possible reason could they have had for becoming parties to a fraud in favour of the child *of a total stranger* to their family?

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Mr. Beltz's hypothesis, and the statements by which he has supported it, have placed him in a dilemma which he may not have foreseen. It is not likely that he has made any converts to an opinion, which is opposed by every known fact of this case, as well as by every motive which actuates mankind; and unless his conjecture be admitted to its full extent, *all his observations* are *valuable* and *conclusive arguments in favour of* Nicholas Knollys' *legitimacy*.

The observations which Mr. Beltz has made on the *Banbury* case must not be concluded without adverting to the hostility with which he appears, in common with all its other opponents, to have approached the subject. His feelings are exhibited in his introductory remarks, wherein, from an exemplary horror of the "glaring injustice of palming upon the country a spurious brood of hereditary legislators," he says, "It is surely well that, in a case of such flagrant immorality as that which is implied in the above passages[1], there should be some jurisdiction, were it even above the law, to prevent the triumph of a scheme of infamy." Every one must regret that a writer of great sagacity and learning, who ought to have

[1] A remark by Sir Egerton Brydges, that it "was most probable in point of fact" that Nicholas was the son of Lord Vaux, and not of Lord Banbury.

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brought to the investigation of a matter of this nature, a mind free from bias, and instinct only with *legal considerations*, should have allowed his prejudices to betray him into so indiscreet and unconstitutional a declaration, as that a right of inheritance should, under *any* circumstances, be tried by a court "*above the Law*;" in other words, that there should be a tribunal for the trial of a *legal right* which ought, in certain cases, to disregard the Law, upon which that, and all other rights are founded!

The Second Objection which was made to the claimant's legitimacy by the Attorney-general in 1661, was that the Inquisitio post mortem of the 9th Car. I., had found that the late Earl of Banbury had died without issue male, which Inquisition, he said, could not be avoided without a traverse or writ "de melius inquirendum;" and as this argument was much relied upon by Lord Redesdale in 1811, it is necessary to inquire into the nature of Inquisitiones post mortem, and to state the facts respecting those in question.

Upon the death of a person seised of lands held in capite of the Crown, it was the duty of the escheator of the county in which such lands were situated, virtute officii, to summon a jury, to inquire into the extent and tenure of his lands, when the tenant died, who was his next heir, and the age of such heir, and to return the verdict into the Court of Chancery. No Inquisition having been taken by the escheator of the county of Berks, or of Oxfordshire, (in which counties Lord Banbury's lands lay,) virtute officii, a special commission[1] was

[1] "If the King's tenant, who holdeth of the King by knight's service in chief, dieth, the heir may have a *special commission* directed to certain persons to inquire what lands, &c, his father held on the day of his death, &c., and that special commission shall be as good for the heir as a writ of 'diem clausit extremum,' after the death of his ancestor."—Fitzherbert's *Natura Brevium*, II. 253.

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issued for that purpose to the deputy escheator of the latter county, on the 10th of April, 9 Car. I., 1633, eleven months after the Earl's decease, the result of which has been stated[1]. Seven years afterwards, measures were taken to perpetuate evidence of the legitimacy of Edward Knollys, and to recover the lands of which the late Earl died seised in fee.

The opinion that the former Inquisition could only be rendered void by a writ "de melius inquirendum," or by traversing the first, appears to be erroneous, for it will be shewn that such a writ could not issue under the circumstances of this case. By Stat. 2 Edw. VI., c. 8, it was provided, that "where one person or more is or shall be founden heir to the King's tenant, by Office or Inquisition; where any other person is, or shall be heir; or if one person or more be or shall be founden heir by Office or Inquisition in one county, and another person or persons is or shall be found heir to the same person in another county; or if any person be or shall be untruly founden lunatick, ideot, or dead, be it enacted, that every person and persons grieved or to be grieved by any such Office or Inquisition, shall and may have his or their traverse to the same, immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden."

It was, however, necessary before a person could traverse such an Office, that he should himself be found heir by another Inquisition[2]. A second Inquisition, on the

[1] *Vide*, p. 304, antea.

[2] "As to the 2nd point [viz. if they should have a traverse to an office before an office was found for them], it was objected, that the plaintiff should have a traverse without any office found for him; for when a direct and sufficient office is found in one county by force of a diem clausit extremum, or mandamus, after the death of the ancestor, there shall never be an office found again for the same land, as long as that stands in its force; for otherwise the Argument.

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death of the Earl of Banbury, was therefore taken in the 17th Car. I., respecting the lands which he held in the county of Berks, the finding of which was at variance

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law would never have an end; and therewith agree 4 Hen. VII. 15; 14 Edw. IV. 5; 15 Edw. IV. 11; 2 Edw. VI. 12. 18; and therefore it would be hard to compel him to find an office for him, before he can traverse; where by the law he cannot find in such case any office. 2. It was objected, that the statute of 2 Edw. VI. c. 8, hath remedied it, if any office were requisite by the Common law, the words of which Act are: 'And whereas one person or more is or shall be found heir to the King's tenant by office where any other person is or shall be heir, or if one person or more be or shall be found heir by office in one county, and another person or persons is or shall be found heir to the same party in another county, &c., be it enacted, that every person grieved by any such office shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed and have like trial and advantage, as in other cases of traverse.' By which it appears that the party grieved shall have a traverse (without speaking of any office), and proceed and have such advantage as in other cases of traverse; and in other cases of traverse there needs not any office. *But it*

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was resolved, that as this case at bar is, the plaintiff ought to have *an office found before* he can traverse. And as to the first objection, it was answered and resolved, that in such special case of finding of an heir, he who is right heir and grieved by the office, shall have a new writ of diem clausit extremum, or mandamus. *For he is a stranger* to the said office, and therefore the office shall not *conclude him.* And the said rule, and the books are to be intended, that *the same person shall not have a new diem clausit extremum, or mandamus, after an office* once duly found, but another person shall have one in that case to prove himself heir, and therewith agree 30 Ass. p. 28. F. N. B. 261, 262; 4 Hen. VII. 15. b.; 12 R. II.; Livery 28 Staunf. Prærog. 52 b. And that there ought to be an office before he can traverse, the Common law therein hath great reason; for when the King is sure of wardship, or premier seisin by the office, it is not reason that any one who pretends himself heir should traverse the first office that the other is not heir, until the King be sure to have profit by him, either by wardship or primer seisin; for then after the first office avoided by traverse, he might show matter to bar the King of wardship and primer seisin, which would not be reasonable. Also at the Common law interpleader lies, where by two several offices in one and the same county, several persons are severally found heirs to one and the same person, to one and the same land; *ergo,* the party grieved may have a writ to find an office for him; for otherwise no interpleader can be; *for the heir who was first found heir shall have a scire facias in the Chancery, against him who is found heir by the second office,* (because the King is in doubt to whom to make livery) upon which if he appear, and justify the second office, for the trial of the privity of the blood, then he *ought to traverse* the first office (for all the interpleading shall be thereupon), and upon the trial thereof, he who is found heir shall have livery. So that it clearly appears, that he who traverses the office in such case ought to have an office found

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with the former, with respect to the heir. Fitz Herbert[1] in treating of the writ "de melius inquirendum," specifies various occasions on which it was to issue, namely, when the first Inquisition *wanteth certainty* in divers points, as in tenure of divers lands, or in the value of any of them, &c. where the jury state that they do not know who was the heir of the deceased, or what estate the tenant had in the lands, or of whom they were holden, or because the true value of them is not mentioned, and the King is informed that they are of greater value than is stated in the Inquisition. Neither of these causes for issuing a writ "de melius inquirendum" apply to the Inquisition on the death of Lord Banbury in 1633, for there is no want of "certainty" in any one

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for him by the common law; and therewith agree 36 Edw. III. Travers. 44; 16 Edw. IV. 4; Fitz. Nat. Br. 162. 262. For he who ought to sue livery, ought to have an office before he traverses. Otherwise of a stranger who destroys the King's title. *Vide* 36 Edw. III. Traverse 44; 12 Edw. IV. 18 b.; 16 Edw. IV. 4. a.; 43 Ass. 20; 9 Hen. VII. 24; 5 Edw. IV. 5; 12 Hen. VI.; 46 Edw. III. Bre. 618. As to the second objection, it was answered and resolved, that the said Act of 2 Edw. VI. gives not a traverse to him who pretends himself to be heir against an office finding for another heir, *without an office found for him*; for that is *incident* to it, which is not taken away by the general words of the Act, for then all interpleaders would be thereby also taken away, which never was the intention of the Act; but the intention of the makers of the Act was, to take away a great doubt that was at the Common law, if one be found heir within age by one office, and afterwards another is found heir in the same county of full age, if any traverse and interpleader should be immediately, or if the traverse and interpleading should stay until the full age of the infant, fuit vexata quæstio, as appears in our books, scil. 36 Edw. III. Traverse 44; 5 Edw. IV. 4; 1 Hen. VII. 14. a.; F.N.B. 162. And therefore to oust that doubt was the stat. of 2 Edw. VI. made, by which it is enacted, 'that the party grieved shall have a traverse immediately,' which word (immediately) proves the intention of the said Act to provide for the said doubt, and to give him who was grieved in such case a traverse presently; *but not to alter the foundation of the traverse, sc. office, which ought to be found for the party grieved before he could traverse*; and where the statute saith, that he shall have a traverse presently, it is intended that he ought to observe all incidents to a traverse; *for the office is the ground and foundation of his traverse.*"—*Kenn*'s case, 7 *Co.* 143–145. 2 *Inst.* 690.

[1] *Natura Brevium*, pp. 254. 256.

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statement therein; and though Fitz Herbert says, that a return that the jury knew not who is the heir of the deceased, is a sufficient reason for issuing a writ "de melius inquirendum," he no where states that the writ is to issue in cases where a jury returns a wrong person as the heir[1].

There are also strong reasons for contending, that of the two Inquisitions, the *last* operated as a supersedeas of the first, inasmuch as it rendered it *imperative on the parties who claimed under the first Office,* to *traverse* the *second*; and if they did not traverse, they were bound by it. By the second Inquisition, the heir was found to be a minor, so that the Crown became entitled to the wardship of such lands as were held in capite; and the heirs under the first Office could only recover those lands by traversing the Inquisition by which the King became entitled[2].

[1] Among the numerous cases of Inquisitiones post mortem which might be cited, wherein the jurors have found different persons to be heirs of the party deceased, those which were collected for the use of Lord Erskine, on the claim to the Earldom of Banbury, and are printed in Le Marchant's *Report of the Claim to the Barony of Gardner*, will be found in the APPENDIX to this work. Many other instances might be given; for example, the case of Sir *George Cornwall* (antea, p. 67).

[2] "Sometyme it happeneth that by two severall offices founde in one county severall parsones bee severallye found heires to one man, wherebye for asmuche as the Kinge is brought in doubt to which of them his hyghnesse may make liverie, they therefore must firste enterplede, and when by enterpleder the privity of the bloode is tried betweene them, then his highnes ought to make the liverye to him that is tryed to bee the next heire of him that dyed. As for an example, by one diem clausit or specyall commission in one countie one is found heyre to hym that dyed the kings tenant and of full age, and by an other diem clausit or speciall commission in the same county one other is founde heire also to hym that dyed and within age, in this case *the heire that was first* founde shal have a scire facias in the chauncerie against hym or her that was last found heire to come and shew why livery should not bee made unto hym of the land comprised in the scire facias as heire to him that last dyed seised thereof, upon which write if a scire feci bee returned and the party defendant cometh not, or if he come and confesse that hee himself is not heire, then the plaintife in the scire facias shall have his livery, *but if hee come and entitle him by the second office, & traverse the first as he needes must* (for the enterpleader must needes rest uppon the first office, & not upon the second) then as the issue is found, so shal hee or they for whom it is found, have livery.

It seems therefore, that in cases of contradictory findings in Inquisitiones post mortem, the one which is most beneficial to the Crown is to be presumed valid until it is

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And this appeareth in the new Natura Brevium, fo. 262, & P. 16. E. 4. f. 4. Travers, 44. P. 36. E. 3. Howbeit a great doubt riseth in our bookes uppon this matter whether the interpleder shal be foorthwith after the second office found or not until such time as the heire that is found within age commeth to his age, and as it appeareth by the sayd booke of 36. T. 3, in this case, where one was fyrst found of full age and after the other within age, the enterpleader was forthwith, for it were no reason that hee that was right heire and of full age should be delayed by the nonage of the other that is no heir. And a straunger shall be receaved to traverse the office notwithstanding the heire that is found by the office that is traversed bee within age. And then it is no reason that the heire in this case bee in woorse condicion than a straunger. But take it, by the fyrst office one is found heire and wythin age, and by the second office an other is found heire, and of full age, whether in this case they shal enterplede or not, or whether the enterpleder shal be before the age of the other: And surely it should seeme by the groundes and rules declared before upon the writ of diem clausit extremum, that the second office in this last case is void, because there is no better title found for the Kyng than was by the first, and then yf it bee voyd, there can be no enterpleader. Howbeit in the new Natura Brevium, fo. 262, it appeareth to the contrary hereof and that they shall enterplede in this case, and that the second office is not voide for there the heires founde by both offices were of full age. And yet that notwithstanding they enterpleded. And so is T. 5, E. 4, f. 4, where it is said that if by one office the heire is *found within age*, and by an other office an other is founde heire and of full age, that in this case they shall enterplede, but not before the child come to his full age. And Townsend justice saith in P. 1. H. 7, fo. 14, That if by dyvers offices. ii. bee severally found heirs and within-age, now the King shall keepe the lands till theire full ages, and then they shall enterplede, and if they dye before enterpleder their heires within age, severall Devenerunt shal bee awarded, that is to say, for every heire one, & by the same being found severally heires to their auncestors, they shal enterplede at their full ages, like as their auncestors shoold have doone if they had lyved, and if the dying of anye of them were without issue & the other found to be his heire, then is the enterpleder determined. Thus may ye see how bookes vary in this matter, and yet by the waye note this difference, that is to saye, where by the first office the heire is found within age and where of full age, for by these bookes it shoold seeme that if hee bee first found within age, notwithstanding that by an other office an other is found heire and of full age, yet he shall not enterplede with the other till hee bee of age: contrary it is if the first bee found of full age, and y^e^ next within age, and the reason may bee for that the Kyng ys first seised of him that is within age, *with whom the lawe weyes more in presumption to bee heire then with the other,* and this tytle is the best title the King hath, for it entytleth his

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traversed [1]. The heirs under the first Inquisition were of full age in 1641, if not in 1633; but the party who claimed to be Lord Banbury's heir in 1641 was a minor, of whose lands the King would have the wardship, which entitled the Crown to issue a commission for a new Office. The order for taking the second Inquisition was consequently issued *by the Court of Wards* [2]; and as Inquisitions of this nature were instituted solely for the advantage of the Crown, it appears that whenever contradictory returns were made, and one of the persons found heir was within age, no measures could be taken for determining the question of right until the minor attained his majority, during which time the King enjoyed his lands [3]. Nor could the party who was first found heir have his general livery until he had destroyed the title, by enterpleader or traverse, of him who was last found heir, if he were an infant [4].

As Edward Knollys did not survive his minority, no steps could be taken to traverse the first Inquisition, supposing that it had been incumbent upon him to do so. Nicholas being the second son, was never found, by In-

highnesse to a greater benefite then dooth the second office, and this second offyce was found uppon a commission graunted more for the Kinges benefite then for the heires that shoold bee founde by the same, and therefore it were reason that hee that is firste founde heire have more favor if anye favour bee to bee shewed than hee that was laste founde heire, or at the leaste for the kinges benefite that the matter bee respited til the child be of age."—Saundford's *Exposicion of the King's Prerogative*, cap. xix, pp. 57[b], 58[a] & [b].

"So it is where the Kynges tytle is in right of any other, as if one bee founde heire by office, and after by an other offyce an other is found heire of the same lands to the selfe same auncestor, in this case hee that was first found heire cannot have hys generall livery until such tyme as he hath destroyed the other tytle either by an enterpleder or a travers, for if it so come to passe that hee cannot enterplede, then must hee travers or by some other meanes avoide the recorde ere hee can have hys said generall livery, as if hee sue his generall liverye otherwise it is then missued, and a good cause geeven to the kyng to reseise."—*Ibid.* 66[a] & [b].

[1] *Ibid.* f. 52[b].

[2] *Vide* p. 318, antea.

[3] *Saunford*, f. 58. 58[b]. 59. 66[a] 66[b].

[4] *Ibid.* f. 66[b].

quisition, to have been heir to his father; and as it appears that no one could traverse an Office who had not himself been found heir to the same ancestor, it was perhaps not in *his* power to quash the Inquisition of 1633. Moreover, he did not become of age until 1652, a period of great political commotion, when it might not have been prudent to vindicate his legitimacy against the adverse finding of the first Inquisition; and as it was not then impeached, it would have been unwise in him to moot the point, even if the legal obstacle, just alluded to, had not prevented his destroying the Office of 1633. His legitimacy and right to the Peerage were not disputed until after the Restoration, when tenancy in capite was abolished, and with it the Court of Wards and Liveries, and all the legal machinery by which Inquisitiones post mortem were put in motion, and on which they depended.

Before dismissing this subject, it must be observed, that Nicholas Earl of Banbury did succeed to part of the lands to which his brother was found heir, namely, to the small estates at Henley[1], and hence the second Inquisition must have been the operative one; whilst none of the property of William Earl of Banbury seems to have been inherited by the persons who were found to be his heirs by the first Inquisition. It was more incumbent upon those persons to have traversed the second Inquisition than it was upon Edward Knollys to have quashed the former one, because the first Office was not binding on the true heir during his minority, it being clear that he might traverse it when of full age; and as he was a stranger to the first Inquisition, he could not have been

[1] No Inquisition was taken after the death of Edward Earl of Banbury in 1646, the reason for which may have been, that all the parties interested were then abroad, and that his mother and step-father were so obnoxious to the Parliament, as to render it unsafe to appear in this country, even if they could have then had a locus standi in any court of justice.

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concluded by it[1]. Nothing having been done to destroy the second Office, it is as much entitled to be considered good and conclusive as the one of 1633; and it may be opposed to the former Inquisition, with this additional advantage, that if statements are inconsistent with each other, the latest ought in most cases to be preferred, because the difference between them may have arisen from the last having proceeded upon fuller and more authentic information. The greater accuracy of the last Inquisition may be also presumed from its stating that the Earl of Banbury died in London, which agrees with the deposition of Dr. Lloyd that his Lordship's death occurred in the house of a physician in Paternoster-row; whereas, according to the first Inquisition, he died at Caversham.

Admitting, however, for the sake of argument, that the Inquisition of 1633 could have been traversed after the Office of April 1641, and that it was incumbent upon the nearest relations and guardians of Edward Knollys to have taken measures for that purpose, it may be asked whether Lord Vaux and Lady Banbury were in a situation which admitted of their doing so? All which is known of them between April 1641 and 1646 renders it very unlikely that either of those persons could have commenced a suit at law during that period. In June 1641 Lady Banbury went abroad, most probably to avoid being apprehended for disaffection to the State[2]; and in January 1642 her husband's house was searched, before which time he seems to have been obliged to quit the realm for recusancy. Lady Banbury appears to have returned to England for a short time, but she again left it in June following. She must, however, have returned towards the beginning of 1643, as in March in that year Parliament ordered her to be confined to her own

[1] *Vide Kenn*'s case, p. 360, antea.

[2] *Vide* p. 320, antea.

house. In July it was proposed to secure her as a professed Papist; and in August she was sent out of the country. In June 1644 the House of Commons ordered that she should be arrested and imprisoned, if she ventured to land in England[1]; and it is said that her son, Lord Banbury, who was probably with his mother, was abroad in January 1645[2], which is the last notice that has been found of her. Thus, from the spring of 1641, when the second Inquisition was taken, to the year before Edward Knollys died, his mother and step-father were constantly exposed to political persecution, compelled to leave the country, and threatened with imprisonment if they returned; facts which are amply sufficient to account for their not having traversed the adverse Office, had such a measure been expedient, or had the law permitted them to do so during Edward's minority. It is not known when Lord Vaux and Lady Banbury ceased to be objects of suspicion to the Government, or when they came back to England; and reasons have been given why Nicholas, the second son, should not have traversed the Office of 1633 after he succeeded his brother in the Earldom[3].

Lord Redesdale's remarks upon these Inquisitions were deeply embued with the prejudice with which he approached every part of the evidence for the claimant. He not only defended the first Inquisition upon grounds which were untenable, but stated two circumstances respecting it, which had no foundation in fact; namely, that "it was held at the proper period, *i. e.* immediately after the decease of the Earl;" and "at the proper place, *i. e.* in the neighbourhood where his family had so long resided;" whereas that Inquisition was not held until nearly twelve months after the Earl's death, and then

[1] *Vide* p. 321, antea. [2] *Ibid.*. [3] *Vide* p. 365, antea.

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by virtue of a special commission, instead of being taken by the escheator virtute officii, or under the usual writ "de diem clausit extremum;" and it was taken at Burford, in Oxfordshire, upwards of thirty miles from the Earl's residence at Caversham, whilst the second Inquisition was held at Abingdon, only half that distance from Caversham. Lord Redesdale said that Lady Banbury was alive when the first Inquisition took place, as if that fact distinguished it from the second. She was also alive in 1641, and did not die until 1658, two years only before the first proceedings in the House of Lords on the claim.

The Attorney-general in 1661 noticed that the lands of Lord Vaux were settled upon the claimant by a conveyance, which settlement appears to have been the deed produced in evidence during the last claim to the Earldom. It was executed on the 19th of October 1646, by Lord Vaux and the Countess of Banbury, then the wife of Lord Vaux, and has been already alluded to. In that instrument Nicholas Knollys, the claimant, is described as "The Right Honourable Nicholas, now Earl of Banbury, son of the said Countess of Banbury, heretofore called Nicholas Vaux, or by whichsoever of the said names or descriptions, or any other name or description the said Nicholas be or hath been called, reputed, or known;" and all Lord Vaux's property was settled upon the said Nicholas after his Lordship's decease, and the decease of Lady Banbury, his wife. The inferences which have been drawn from this deed are, that as Lord Vaux settled his property upon Nicholas, and as he had once borne the name of "Nicholas Vaux," it afforded a strong presumption that he was the son of Lord Vaux by Lady Banbury: but these facts were perfectly consistent with the relationship in which

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he stood as son-in-law to Lord Vaux. That nobleman was the fifth in descent from Nicholas Vaux, the first Baron Vaux of Harrowden. He married Lady Banbury in 1632, and having no children of his own, it is not unreasonable to suppose that he entertained so much affection for her only surviving child, whom he had known from his birth, who seems to have been brought up with its mother, and consequently to have lived always with him, as to induce him to adopt him as his own son. This, which is of frequent occurrence, would remove the suspicion which the settlement of 1646 has created respecting Nicholas's legitimacy. It certainly appears from that deed that he had borne the name of his stepfather, which agrees perfectly with, and is explained by, Lord Vaux's intention of giving all his property to him[1]. It has never been proved that the child was baptized by the name of Vaux, and as a woman who was his nurse swore that he was not called by that name, he must, unless she was perjured, have received the appellation of Vaux at a later period, and probably not until his father-in-law determined upon adopting him. He is not described by the name of Vaux in the licence granted to Lady Banbury to travel in June 1641, but simply as "her youngest son," the natural description of a mother and her child, then under eleven years of age. The description of Nicholas

[1] Among the many instances which might be cited of similar assumptions of the names of benefactors, is that of Sir Robert Agsborough, *alias* Townshend, (the first person that received the honour of knighthood from King Charles II. after his coming to London in 1660) who was the only son of William Agsborough, a merchant, of London. He was only three months old when his father died. His mother shortly afterwards married Aurelian Townshend. Sir Robert having lived with and been educated by his stepfather, was generally known by the name of Townshend; and in a public instrument, dated 12th March 1662, he was authorized to assume the name and bear the arms of Lord Townshend. Mr. Townsend's MSS."—*Le Marchant*, p. 424.

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in the settlement of 1646, which proves that he had borne the name of Vaux, seems, at the first view, to be at variance with the statements of Mary Ogden his nurse, and of Edward Wilkinson, before the Committee in 1661, both of whom asserted that in his infancy he was called Nicholas Knollys; and their evidence has consequently been the subject of obloquy. But a more attentive consideration of the description of him in the deed of 1646, will reconcile the apparent discrepancy. The precise words are "The Right Honourable Nicholas, now Earl of Banbury, son of the said Countess of Banbury,"—to which title he succeeded on the death of his brother Edward, a few months before the settlement was executed, "heretofore called Nicholas Vaux," —that is, at *any* period, *however short*, before he assumed the title of Earl of Banbury,—"or by whichsoever of the said names or descriptions, or any *other name or description* the said Nicholas be or hath been called, reputed, or known."

If he had never borne *any other* name than "Nicholas Vaux," or "Nicholas Earl of Banbury," the proviso for "any *other* name or description" than the two which were specified, would have been unnecessary; hence it may be inferred that those words were introduced in consequence of his having, at an *earlier* period, borne the name of *Knollys*, and which two of the witnesses in 1661 swore was the case.

If, then, the facts were, as there are grounds for believing, that Nicholas bore the name of Nicholas *Knollys* at, and for some time after, his birth; that when Lord Vaux resolved to make him his heir, he authorized him to assume the name of Vaux, of which there are innumerable examples; and that, before he formally settled his estates upon him, Nicholas (as did actually happen) succeeded to the Earldom of Banbury, the sus-

picion against his legitimacy, to which the description of him in the settlement of 1646 gave rise, will disappear.

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The evidence of Edward Wilkinson applies only to the name which the child bore after the Earl of Banbury's death, and proves that he was called Nicholas Knollys until he was more than a year and a half old; and though his nurse, Mary Ogden, said "she had known him all along as her own child;" that in his brother's lifetime he was known to her by his baptismal name of *Nicholas* only, and that she "never knew him called Nicholas Vaux in her life," there is nothing which ought to shake her credit in those statements, because his nurse was, of course, in the habit of addressing him by his *baptismal* name; and he might have borne the surname of Vaux for so short a time,—it might have been so seldom applied to him in conversation or in her presence,—she may have seen him so rarely, and for such brief periods after it was given to him,—that she really might not have been aware of the circumstance. Though she was employed for fifteen months as the child's nurse at Harrowden, she does not appear to have continued in the service of Lady Banbury.

Indeed, so far from the description of Nicholas in the deed of 1646 being evidence of his illegitimacy, it admits of a totally opposite conclusion; for it may be adduced as proof, that his mother and his step-father, as well as their legal advisers, entertained no doubt whatever respecting his legitimacy, or his right to the Earldom of Banbury. If the remotest possibility was anticipated of his legitimacy being disputed, is it probable that a deed from which he was to derive advantage, would have been so worded as to be capable of producing an inference injurious to the most important object to which he could aspire? If the simple fact, that

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before he succeeded his brother in the Earldom, he had sometimes borne the name of his adopted father, was considered likely to raise a prejudice against his legitimacy, would it have been boldly stated in the instrument, without any explanation to remove such an impression? It is the nature of guilt to mystify and conceal whatever may lead to suspicion; but when did persons whose interests, and the interests of the party dearest to them in the world, require the concealment of any circumstance, ostentatiously, if not needlessly, avow a fact which might lead to detection? If it were necessary for the purpose of identification to describe Nicholas by any other terms than as "Nicholas, now Earl of Banbury, son of the said Countess of Banbury," and if it had been imagined that the statement that he had borne the name of "Nicholas Vaux," or any other name, might create an injurious impression respecting his birth, what would have been easier than to insert such an explanation of the cause as would prevent any inference of that nature? In proportion to their consciousness of the justice of such an inference, would have been their quickness of apprehension that it must arise, and their anxiety to defeat it. The proper legal construction of that deed seems, therefore, to be, that the motive of it was to benefit the *step-son* and *adopted heir* of *one* of the parties, and the *only child* of *the other*; and it may be argued, that as there was no unworthy or secret cause, which prompted Lord Vaux to adopt his step-son, there was nothing to conceal; and that his Lordship allowed the instrument, by which he settled his property upon him, to bear evidence that his affection had induced him to give him his own name.

The trustees of Lord Vaux's estates for the benefit of his son-in-law, instead of being obscure individuals, who might be supposed ready to perform any disrepu-

table office, were persons of high rank; and two of them were nearly connected with Lady Banbury. They were the Earl of Salisbury, who married her sister; her brother, Edward Lord Howard of Escrick; and Sir Robert Thorold of Harroby, baronet, whose stations in society render it improbable that they would be parties to an instrument which contained a false description of the principal person concerned. It is another important feature in the case, that Lord and Lady Salisbury certainly considered Nicholas to be the legitimate child of the Earl of Banbury, because the proceedings in Chancery in 1641 were instituted in Lord Salisbury's name, as the prochein amy and guardian of his late nephew, Edward Vaux Earl of Banbury; and Lady Salisbury offered herself as a witness in her nephew Earl Nicholas's favour, in 1661. Lord Howard of Escrick, his uncle, was likewise a party to the settlements of Caversham on Lady Banbury in April 1631, and must have been well aware of the real facts relating to the birth of his nephew, only three months before.

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If, however, a different view be taken of this transaction, and it be insisted that it is pregnant with evidence that Lord Vaux was the real father of the object of his bounty, it is a sufficient answer, *in point of law*, that though such may have been the opinion of Lord Vaux; nay, that though such may also have been the opinion of Lady Banbury herself, yet unless it be *positively proved* that Lord Banbury *had not access* to his wife, or was incapable of sexual intercourse at a time when, if he had such access, and was capable of procreation, he might be the father of the child, neither Lord Vaux's nor Lady Banbury's opinion, nor any act of theirs, could bastardize her children. Nicholas, though a party to that settlement, was then a minor, and was not bound by any description of him which it might contain. He was ignorant of their

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motives; and if they were guilty, he ought not to be punished for their crime. The law presumes that he was legitimate, because he was born in wedlock; and that presumption cannot be rebutted by giving to any deed a particular construction, founded upon mere inferences, more especially when, as in this instance, he was not bound by any statement therein, when the deed itself is susceptible of a construction perfectly consistent with the relationship in which he stood towards the authors of it, and which construction would completely remove every suspicion to which it has given rise.

It is a maxim of law, that *every thing is to be presumed in favour of legitimacy*; from which it necessarily follows, that if, in a case of disputed legitimacy, an instrument be produced which is capable of two constructions; one for, and the other against, the legitimacy, the *proper* and *sound* legal construction, under such circumstances, is, *that* which *supports* the *legitimacy*.

The preceding remarks apply chiefly to the objections which were made to the claim by the Attorney-general in 1661, some of which objections were repeated during the last proceedings before the House of Lords. The additional objections raised by Lords Eldon, Redesdale, and Ellenborough on that occasion, will now be alluded to.

Of the other circumstances which were then considered to raise a strong presumption against the legitimacy of Nicholas Knollys, the principal were, his never having claimed the manor of Rotherfield Greys; the presumed concealment of his birth from the Earl of Banbury; the King's message to the House of Lords in 1628; and the marriage of Lady Banbury to Lord Vaux within five weeks after her husband's decease; each of which points will now be considered.

I. The non-claim to the manor of Rotherfield Greys.

It was taken for granted by Lords Eldon, Redesdale, and Ellenborough, that the Earl of Banbury could not bar the entail of that manor, because the grant of it, to his father and the heirs male of his body, was for services rendered to the Crown[1], and because the grant was confirmed by two Acts of Parliament in the reign of Henry the Eighth. Without discussing the correctness of this view of the subject, it is sufficient for the purpose of destroying the inference which has been drawn from the non-succession, and non-claim to that manor by Nicholas Knollys, to *prove* that, *according to the opinion which prevailed in his time*, the *alienation* of those lands by the Earl of Banbury *was legal* and *indefeasible*; and to show that there were *strong grounds for such an opinion.*

The Earl of Banbury inherited Rotherfield Greys as heir male of his father under the letters patent and statutes of Henry the Eighth; but he nevertheless obtained a *re-grant* of it from King James the First in 1610, to hold to him and *Elizabeth his wife*, and the heirs male of his body, in default of which, to the heirs male of the body of his father. In 1621, the Earl obtained a *new* grant of that manor from the King, to hold to him and *Elizabeth his wife for their natural lives*, and for the life of the survivor of them, with the same remainder as was contained in the patent of 1610. Rotherfield Greys was also included in the letters patent of February 1628, by which the manors of Cholcey, Hackborne, and others were granted by the Crown to the Earl and Countess, with remainder to the heirs male of the bodies of Sir Francis Knollys and Katherine his wife, father and mother of the said Earl[2]; and this grant was considered to have created his title to that property.

[1] Lord Eldon's speech, *vide* postea.

[2] *Vide* p. 292, antea.

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It is evident, that as early as 1610 the Crown was considered to have the power of altering and controuling the grant of Rotherfield Greys by Henry the Eighth, notwithstanding the two Acts of Parliament by which it was confirmed to Francis Knollys and the heirs male of his body, because the letters patent of 1610, 1621, and 1623, granted the manor to the Earl and *his wife jointly* for their lives, so that, if she survived him, she would have had a life interest in that estate, which is at variance with the grant and statutes of Henry the Eighth. It does not appear that the statutes in question were ever repealed; nor has it been discovered that a resumption of the grants of the Crown lands was authorized by any Act of Parliament in the reign of Edward the Sixth, Queen Mary, Queen Elizabeth, or James the First. If, however, the statutes and grant of Henry the Eighth were operative and indefeasible, the several grants of Rotherfield Greys by James the First were void; but the last of those patents, and not the patent or statutes of Henry VIII., must have been *deemed to be the operative grant*, because the *patent of* 1623 is the *only* instrument referred to in the subsequent proceedings respecting that manor, as having created Lord Banbury's title to it. In 1631, the Earl and Countess of Banbury obtained the King's license to alienate Rotherfield Greys in favour of Sir Robert Knollys[1], who, if the Earl died without issue male, would have inherited it as heir male of the Earl's father, immediately after the Earl's decease, pursuant to the letters patent and statutes of Henry the Eighth; but if those instruments were, as was then believed, controuled or rendered nugatory by the subsequent grants of James the First, Sir Robert Knollys would not have succeeded to the manor until the decease of the Countess of Banbury.

Shortly after obtaining the license to alienate Rother-

[1] p. 302, antea.

field Greys, the Earl and Countess covenanted to levy a fine of that manor to Sir Robert Knollys and his heirs; and they agreed that he and his heirs should be "seised thereof of a good and lawful estate, *as it was to the Earl* and Countess granted in the premises by *certain letters* patent of the 8th of February, 20th Jac. I., 1623[1];" and *no reference* is made to *any previous grant*. A fine was accordingly levied; and in June 1631 *Sir Robert Knollys* obtained a *new grant* of the manor from the Crown, to hold to him and his heirs and assigns[2], which grant, like all the other grants from James the First, was contrary to the patent and statutes of Henry the Eighth.

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Before adducing additional evidence of what were the opinions of the lawyers who were consulted by Lord Banbury and Sir Robert Knollys respecting the title to Rotherfield Greys, it is desirable to inquire *what could have been* Lord Banbury's *motive*, when he was eighty-five years of age, for settling Rotherfield Greys upon a person who would have succeeded to it either immediately or eventually, without any new settlement whatever, if the Earl died without heirs male of his own body? No one can doubt that there was a *strong motive* for this proceeding; and it may have arisen from a desire to vest Rotherfield Greys in a collateral branch of the Earl's family, whose succession, under the former settlements, was impeded by the birth of an heir male of his body; or it was more probably a sale for the purpose of obtaining a large sum of money, there being no doubt that the Earl was in pecuniary difficulties. It is true that the fact of the manor having been sold does not appear in the instrument itself, but it was unusual in those times to state any pecuniary consideration in the deed, the receipt for which was made by a distinct acquittance. This

[1] p. 302, antea.

[2] p. 303, antea.

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view of the case is borne out by Sir Robert Knollys having himself alienated the estate to a stranger, about ten years afterwards; for had it been granted to him by the Earl of Banbury to support the dignity of his family, it is very improbable that the donee would have parted with it.

In 1634, Sir Robert Knollys surrendered the grant which he had obtained from the Crown of Rotherfield Greys, and received a *new grant* of it in favour of himself and the heirs male of his body, with remainder to his brother Francis, and to his uncle, Francis Knollys, and the heirs male of their bodies respectively, with reversion to the Crown. This grant was also contrary to the patent and statutes of Henry the Eighth, inasmuch as it *excluded* all *the other heirs male* of the body of Sir Francis Knollys, the first grantee, except those who were mentioned in the instrument; and if those statutes were then operative, and rendered it illegal for the Earl of Banbury to alienate the manor from the heirs male of his body, the sale of Rotherfield Greys by Sir Robert Knollys and his eldest son to Sir John Evelyn and his brother, Arthur Evelyn, in May 1642, must have been invalid. That proceeding could no more defeat the claim of the other heirs male of Sir Francis Knollys, than it could defeat the claim of Nicholas Earl of Banbury; but no claim was made by them, or by any other party entitled under the letters patent and statutes of Henry the Eighth; which facts shew the *general opinion* that prevailed that the grant by James the First in 1623 *was not controuled* by the statutes or patent in question.

The answer to the objection, that if Nicholas Knollys was legitimate he would have claimed Rotherfield Greys, is therefore this,—that both the Crown and the tenants had, on divers occasions, acted upon the presumption that the title to Rotherfield Greys was not created by the

patent or statutes of Henry the Eighth, but by the letters patent of James the First, and that the party to whom the Earl and Countess of Banbury sold that manor, surrendered it to the Crown, and obtained a re-grant of it, under which he alienated it from the family of Knollys, many years before Nicholas Earl of Banbury became the heir male of his father. But whilst the non-claim to Rotherfield Greys by Nicholas Earl of Banbury has been urged as proof of his consciousness that he was illegitimate, the fact has been entirely lost sight of that he *did inherit* the small estate at Henley, as *heir to his brother* Edward, *whose right* to it, as *son and heir* of William Earl of Banbury, *was established* by the *second* Inquisition of 1641; and that no claim was made to it by the persons who were found heirs to Lord Banbury under the first Inquisition.

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However difficult it may be to explain Lord Banbury's motive for changing the settlements of his property, and however much his conduct is prima facie inconsistent with the feelings by which a father may be supposed under ordinary circumstances to act, it may nevertheless be reconciled with his being fully aware that he had heirs male of his own body, and with his entertaining paternal affection for them. His alienation of Rotherfield Greys may be attributed to the pecuniary embarrassment under which he laboured. Upon Caversham he raised a mortgage, and the alteration in the settlement of that manor may have been necessary for that purpose. The same pecuniary difficulties which obliged him to raise money upon Caversham, may have also obliged him to sell the reversion of Cholcey to Lord Holland. Of the various other manors mentioned in the grant of 1623, no notice is taken in either of the Inquisitiones post mortem; and the inference therefore is, that they were sold before the Earl's decease, which, if such were the fact, would be additional proof of his necessities. Except

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Rotherfield Greys, about which enough has been said, the *only* property to which the heir-at-law of Lord Banbury could establish a legal right appears to have been the *estate at Henley*, and *this was actually inherited* by *Edward*, and after his death, *by Nicholas*, Earls of Banbury, as the *legitimate sons of Lord Banbury*. The descent of that property to those individuals may be fairly adduced as *evidence* of *their legitimacy*, in opposition to all that can be said of their *not having possessed* or *claimed Rotherfield Greys*, being evidence of their *illegitimacy*. The collateral heir of Lord Banbury did not venture to dispute their right to the property at Henley; and sufficient reasons have been stated to show that, whether correctly or not, an opinion did undoubtedly prevail that the Earl could legally alienate Rotherfield Greys from those heirs who would have been entitled to it under the grant and statutes of Henry the Eighth.

II. Upon the alleged concealment of the birth of the children from Lord Banbury little need here be said, because remarks tending to destroy such a presumption will be found in several other parts of these observations. It was distinctly negatived by the witnesses in 1661, and the idea cannot be entertained without imputing gross perjury to them, for which imputation there is not the slightest foundation.

III. Reasons have been submitted to show that the Earl's conduct respecting his Precedency may be explained upon totally different grounds from those which have been assigned to it; and that it was not inconsistent with his knowledge of the existence of Edward Knollys, who was the only one of the children living in 1628.

IV. Lady Banbury's marriage with Lord Vaux within six weeks after Lord Banbury's death, has also been considered additional evidence that Lord Vaux was the actual father of her children. Although instances

certainly do occur, in which an adulterer marries the partner of his guilt as soon as the law permits him to do so, it usually happens in cases where the crime is notorious, and where it has been proved in a court of law, or where the female is enceinte, and it is wished to render the infant legitimate. Lady Banbury had no child after 1631, nor was she ever publicly accused, much less convicted, of adultery. If Lord Vaux had, as has been said, intrigued with her for four or five years before the Earl died, his passion would probably have been sufficiently cooled to prevent his raising a suspicion against Lady Banbury's virtue, by so unnecessary and injudicious an act as that of marrying her before she had even administered to her husband's will. If the usual motives which influence mankind are to be brought forward in explanation of the conduct of parties one hundred and fifty years after their deaths, the hasty marriage of Lord Vaux and Lady Banbury ought rather to be attributed to the impatience of a man, who had sighed for years at the feet of a virtuous woman, and who had been prevented from possessing her person by an insurmountable barrier. Hasty marriages of this nature, however, were then, as since, by no means uncommon; and the marriage settlement of Lord Banbury himself with the Countess was executed within *little more than two months* after the *death of his first wife*[1].

A more convenient place may not occur for alluding to the *positive evidence* which exists of Lord and Lady Banbury's having been together on various occasions between the years 1629 and 1631, as proof, not only *of access*, but of *physical possibility*, as well as of *strong moral probability* of nuptial intercourse having taken place between them within that period. They must have been personally present in the Courts in Westminster

[1] *Vide* p. 293.

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Hall for the purpose of levying fines in January or February 1630; again in November in that year; and again in April and June 1631. Evidence is also extant of their having lived on the most affectionate terms; and of his having manifested for her that confidence and attachment which never yet existed, where the shadow of suspicion had crossed a husband's mind of his wife's fidelity. In November 1629 the Earl settled the manor of Caversham upon her in fee, expressly because "*she had always been unto him a good* and *loving wife*;" and that nothing might be wanting to negative scandal and calumny, he appointed Lord Vaux, the supposed dishonourer of his bed, and the alleged father of his wife's children, a party to that settlement, giving him the Earl of Holland, a nobleman of the highest character, as his colleague. This mark of the Earl's affection for his wife was farther corroborated in May 1630 by his will, in which he appointed her his sole executrix; and in that solemn instrument, in which men are rarely hypocritical, he again bore testimony to her worth, by describing her as his "*dearly beloved wife.*"

Edward, the eldest son, was born in April 1627; and Nicholas, the claimant, was born in January 1631; so that the latter was *actually conceived,* and in *his mother's womb* when the Earl styled her his "*dearly beloved wife,*" and bequeathed to her all his property; and she had been for *more than seven* months pregnant with him, when the Earl and Countess appeared publicly together in a Court of Justice.

There is therefore—

I. Evidence of the most conclusive and irresistible character, of *access* having repeatedly taken place between a husband, capable of procreation, and his wife, at a time when, by the course of nature, he might have been the father of the child.

II. Evidence of the husband never having entertained

a suspicion of his wife's fidelity, but on the contrary, of his having always manifested the utmost affection for, and confidence in her.

III. Evidence of the husband and wife having been together in public when she was more than seven months pregnant with the child whose legitimacy was disputed, when he himself must have seen her condition, without having withdrawn his affection from her, instituted proceedings against her for adultery, separated from her, or done any one act from which it can be inferred that he repudiated the infant, entertained the slightest suspicion of its paternity, or doubted his wife's fidelity.

IV. On the other hand, there is *no proof* of any improper intercourse having taken place between Lady Banbury and Lord Vaux, or any other person. She was never accused, much less convicted, of adultery; and she was never even separated from her husband, whose entire confidence and ardent affection she enjoyed to the hour of his death.

Waving the *legal presumption*, that under those *circumstances* the husband must be supposed to have had *sexual* intercourse with his wife, it is asserted with confidence that there is every *moral probability* that the Earl had sexual intercourse with the Countess early in the year 1630; for even supposing that an adulterous connexion did exist at that time between her and Lord Vaux, that connexion by no means negatives the possibility of her also having had occasional nuptial intercourse with her husband.

All authorities, and every decided case, down to the year 1661, when the Lords' Committees reported in favour of the legitimacy of the Earl of Banbury, prove that that decision was strictly accordant with law; and it is impossible to doubt that, if the question had then been referred to a jury, their verdict would have been to the same effect.

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The House of Lords did not, however, adopt the report of the Committees for Privileges, and determined that the matter should be examined by the whole House. All parties were therefore ordered to attend at the bar on Monday the 8th of July 1661, one week after the report was presented, but the hearing was afterwards postponed until the next day[1]. On the 4th of July the following persons were sworn as witnesses in the Earl of Banbury cause, preparatory to the proceedings before the Committee, viz. Anne Delavall, Anne Read, Mary Ogden, and Edward Wilkinson, (all of whom were examined on the former occasion,) together with Charles Wilsford, Humphrey Elmes, Edmund Playden, John Sands, and Percy Butler[2]. The earliest entry of the names of any witnesses sworn, in any witness-book of the House of Lords now extant, is dated on the 29th of June 1661[3], twelve days after the first Committee met, and it is consequently not known who were intended to be examined on that occasion.

Counsel for the Earl, and the Attorney-general and Serjeants Maynard and Glynn on behalf of the Crown, were accordingly heard by the House on Tuesday the 9th of July, and the business was adjourned to the next day[4], when, "after long debate," it was ordered, that the subject should be "referred to the consideration of the Committee for Privileges; and *also the* matter of the *right of Precedency* between the said Earl of Banbury and several Peers of this realm, and to make report thereof to this House[5];" and the Committee was ordered to meet on Monday, the 15th of July.

Among the imperfect memoranda in the Minute-book

[1] *Printed Evidence*, p. 60. [2] *Ibid.* p. 55. [3] *Ibid.*

[4] *Ibid*, p. 60. "There does not appear either in the Minute-book or in the Journal any entry of any evidence given at the bar of the House either on the 8th day of July or on the 9th of the same month, to which day the hearing of the cause was postponed, and on which day accordingly it appears to have been heard at the bar of the House."—*Ibid*, p. 56.

[5] *Ibid.* p. 61.

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is the following, the date of which is not stated, but it appears to be assigned in the Printed Evidence to the 10th of July 1661, the day on which the House a second time referred the claim to the Committee for Privileges, with the additional order to consider the right of Precedency. "Ordered, that there be no writ sent to the Earl of Banbury to Parliament, and that Mr Attorney-general do prepare a Bill to prevent things of this nature in the future. The Earl of Banbury's business recommitted to the Committee of Privileges to consider of the matter now in debate[1]."

If this minute be correctly assigned to the 10th of July 1661, it tends to negative the inference which has been drawn from the words of the entry on the Journals of that day, that the Committee was satisfied of the claimant's legal right; but there are reasons for believing that the minute refers to the next session, and that it was made shortly before the introduction of the Bill for declaring the Earl illegitimate, on the 9th of December following, because it does not agree with the order of the House as it stands on the Journals, and because no Bill was brought in during the session in which that order was made.

The Committee again met on Monday the 15th of July 1661, when, after reading the standing order respecting the Earl of Banbury's precedency, made in March 1628, it was proposed "to report that the Earl of Banbury in the eye of the law, (is legally) the son of the Earl of Banbury, and therefore the Committee think it to be fit that the House should advise the King to send the Earl of Banbury a writ to come to Parliament; and that he ought to have his place according to the statute of 31 Hen. VIII., and not according to the creation;" which is followed by a notice of Lord Stafford's grant of precedency[2]; and the question was then put upon both the

[1] *Printed Evidence*, p. 61. [2] *Ibid.* p. 61; *vide* p. 343, antea.

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above points, the first being thus stated: "The Committee are of opinion to report that Nicholas Earl of Banbury being, in the eye of the law, son to William late Earl of Banbury, the House should therefore advise the King to send him a writ to come to Parliament," which was "carried in the affirmative;" and as no division is stated to have taken place, it may be inferred that the Committee were unanimous. It also appears to have been resolved that the Earl should sit in the House according to the date of his patent, and not in the place specially granted to him. The Report was presented by the Earl of Northampton on the 19th of July, and "offered to their Lordships' judgment;" and the House ordered it to be taken into consideration on the following Monday [1].

[1] The following is a copy of the proceedings between the 9th and 25th of July 1661, alluded to in the text, as they occur in the *Printed Evidence*.

"Lords' Journals.

"*Die Martis*, 9° *die Julij* 1661.

"This day the cause of Nicholas Earle of Banbury, upon his Petic'on, wherein he prayeth a writt of summons to this Parliam^t as Earle of Banbury, & to enjoy all the precedencies & priviledges thereunto belonging granted by His Ma^tys letters patents to the last Earle of Banbury, was heard by councell on the E. parte, and alsoe Mr. Attorney-generall, Serjeant Maynard, & Serjeant Glynn, councell on the King's behalfe were heard. And in regard it was now late, it is ordered, that the resoluc'on of this business shall be taken into considerac'on to-morrow morning."

"*Die Mercurij*, 10° *Julij* 1661.

"Upon consideration of the busines of the Earle of Banbury heard at this barr yesterday, and after a long debate thereof, it is ordered, That the matter now in debate concerning the Earle of Banbury is referred to the consideration of the Co'mittee for Privileges; and alsoe the matter of the right of precedency betweene the said Erle of Banbury and several Peeres of this realme, and to make reporte thereof to this House, the Co'mittee to meete on Monday next, at 3 of the clocke in the afternoone."

"In the Minute Book.

'*Eodem Die.*

"Ordered, That there be noe writt sent to the E. of Banbury to Parl^t and that Mr. Attorn. Gen' doe p'pare a Bill to p'vent things of this nature in the future.

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It is here desirable to review the proceedings in the House of Lords up to that moment.

A motion for inquiry into the Earl of Banbury's right to sit in the House was made on the 13th of July 1660; but no proceedings followed, and he continued to sit

" The E. of Banburyes busines reco'mitted to the Co'mittee of Priviledges to consider of the matter nowe in debate."

" *Munday*, 15° *Julii* 1661.

" Com^e of Privilege.

E. North'-ton.

" The order of reference concerning the E. of Banbury read.

" The standing order of the House concerning the E. of Banbury read.

" To report that the E. of Banbury in the eye ofthe law (is legally) the son of the E. of Banbury, and therefore the Co'mittee thinke it to be fitt that the H. should advise the King to send the E. of Banbury a writt to come to Parl':

" That he ought to have his place according to the statute of 31 Hen. VIII. and not according to the C'.

" L. Stafford had a pattent to be Baron Stafford, the House would not allow him the precedency of the auncient Barony, but yet allowed him the Barony & p'l'ce, according to the date of his patent.

" The Co'mittee are of opinion to report that Nicholas E. of Banbury being in the eye of the law son to W^m late E. of Banbury, the House should therefore advise the King to send him a writt to come to Parl'.

" Carried in the affirmative.

" That the E. ought to have place in the House of Peers according to the date of his patent, & not according to the tenor of that part thereof w'ch ranketh him before other Earles created before him."

" Lords' Journals.

" *Die Veneris*, 19° *Julij* 1661.

" The E. of North'on reported from the Com^tee of Priviledges, that their Lo'ps have considered of the Earl of Banburies busynes referred unto them; and their opinion is, that the Earl of Banbury is in the eye of the lawe sonne of the late William Earle of Banbury, the House of Peeres should therefore advise the King to send him a writt to come to Parliam^t.

" Also their Lo'ps are of opinion that the Earle of Banbury ought to have place in the House of Peeres according to the date of his patent, and not according to the tenour of that part thereof which ranketh him before other Earles created before William Earle of Banbury; all w^ch the Com^tee offers to their Lo'ps judgm^t.

" Ordered, That this House will take this reporte into consideration on Monday morning next."

" *Die Jovis*, 25° *die Julii* 1661.

" Ordered, That on the second Thursday after the next meeting of this House after the adjournm^t this House will take into considerac'on the report of the Earle of Banburies business."

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and perform all the duties of a Peer during the remainder of that session, above four months. Not receiving a writ to the ensuing Parliament, he petitioned the King that it might be issued as a matter of right, and also that he might enjoy the Precedency granted by the patent of the Earldom. The petition was referred to the House, and the House referred it to the Committee for Privileges. On the 1st of July 1661, the Committee reported in favour of his claim. The House, however, refused to adopt that Report, and proceeded itself to investigate the matter on the 9th and 10th of July. Counsel were heard at great length for and against the claim, which was for "a writ of summons to Parliament as Earl of Banbury, *and to enjoy all the Precedencies* and privileges thereunto belonging, as granted by the letters patent of the dignity." After "a long debate," the subject was again referred to the Committee for Privileges, by an order, which does not admit of a doubt that the result of the proceeding before the House was favourable to the Earl, because he is described therein as "Earl of Banbury," and, still more, because the Committee were also directed to consider the Earl's claim to *Precedency* over several other Peers; which order would have been superfluous, if, from what appeared to be the feelings of the House, the Earl's right to the Peerage was likely to be denied.

The Committee met a second time on the 15th of July, and again reported that as the Earl was legitimate in law, they thought the House should advise the King to send him a writ of summons; and on the point of Precedency the Committee came to the same conclusion as the House did in 1628; namely, that he should have Precedency from the date of the patent. Thus, the *question of the Earl of Banbury's legitimacy seems to have undergone* THREE INVESTIGATIONS; *twice* be-

fore the Committee for Privileges, which *both times reported in his favour*; and *once before the whole House*, whose sentiments, as must be inferred from the order of the 10th of July respecting his Precedency, were likewise in favour of his right to be summoned to Parliament.

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The party in the House who resisted the claim were nevertheless resolved to continue their opposition. They succeeded in preventing the second Report of the Committee from being adopted, and it was ordered that it should be taken into consideration on Monday the 21st of July. Nothing is recorded to have occurred on that day; but on Thursday the 25th, "it was ordered, that on the second Thursday after the next meeting of this House, after the adjournment, this House will take into consideration the Report of the Earl of Banbury's business." Five days afterwards the House adjourned until the 20th of the following November [1].

These proceedings must have arisen from a struggle between two parties in the House of Lords: the one party being anxious that the Law should take its course; and the other party being determined to prevent the claimant from enjoying the honours of the Peerage. The inconvenience of the House of Lords being the only tribunal before which questions of Peerage, involving matters of Law as well as of fact, are tried, may have been felt on other occasions; but on none was the conduct of the majority of the House so repugnant to those rules of justice by which all other Courts in this country are guided. A subject, claiming a Common-Law right of inheritance, had that right *twice*, if not *thrice*, admitted by Committees of the House of Lords, or by the House itself, after an examination of witnesses and elaborate discussion. But the tribunal before which he was compelled to try his cause,

[1] *Printed Evidence*, p. 62.

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and from which he had no appeal, studiously avoided pronouncing its judgment. A distinction which is alike unknown to the Law and to the Constitution, between a right of inheritance *de jure*, and a right *de facto*, was drawn by his judges; and he who had for several years borne the title of a Peer, and who had actually sat and voted as a Peer, was debarred from the full enjoyment of his Peerage, not by a solemn judgment of the House, as a Court of Law, that he had *no right* to it, but by the House having from time to time postponed the consideration of the Reports of its Committee. If the matter in dispute had been an estate of land, and had been cognizable by the Common Law courts, it is utterly impossible that such a denial of justice could have occurred; but it will be seen that the majority of the House of Lords were resolved, per fas aut nefas, to exclude Lord Banbury from its walls; and the whole proceedings abound with the most striking legal anomalies to be found in the modern history of this country, with the exception perhaps of its own proceedings in the analogous case of the Viscountcy of Purbeck[1].

The House again met in November 1661; and on the 28th of that month, it "took into debate the Report concerning the Earl of Banbury formerly made to the House. And the question being put, whether to put off the consideration of this business to a further prefixed day, it was resolved in the affirmative," and Monday the 9th of December was appointed for that purpose[2].

On that day a Bill for declaring the Earl of Banbury illegitimate was read a first time, which is the only thing stated to have been done on that occasion. The Bill was as follows:

"Whereas Sir William Knollys Knight, of the most Hon^ble^ Order of the Garter, was in his life-time by the

[1] *Vide* p. 90 et seq., antea.

[2] *Printed Evidence*, p. 63.

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grace and favor of or late Soveraigne Lord King James (of blessed memory) created Lord Knollys of Grays, and afterwards Viscount Wallingford, and at last by the further grace and favor of the late King Charles the First (of blessed memory) was advanced vnto the dignity and title of Earl of Banbury. And whereas the said Earle did in his old age take to wife Elizabeth late Countesse of Banbury, which said Countesse during that coverture and intermarriage had issue of her body, Edward and Nicholas, who were never acknowledged by or known to the said Earle in his life-time as his children, hee reputing himself childles, but their birth and breeding were altogeather concealed from him, they, the said Edward and Nicholas, during the life of the said Earle, and long after, being co'monly called and known by the names of Edward and Nicholas Vaux; and about the space of a year after the death of the said Earle an office or inquisic'on was had and taken, whereby it was found by the oathes of the jury that the said Earle died without issue, and the said Countesse many years after the finding of the said office did first produce the said Edward and declared him Earle of Banbury, not p'tending at that time to have any other issue male inheritable to the said Earldome, and after the death of the said Edward without issue she the said Countesse did then produce the said Nicholas and declared him likewise Earle of Banbury. Now in respect of the notorietie of the fact, and to the end that a practice so much to be abhorred may receive a publique discountenance and others may therefore be deterred from the like for the future; and for that the illegitimac'on of children born in wedlock can noeway be declared but by Act of Parliament:

" Bee it therefore enacted by the King's most Excellent Matie, by and with the advice and consent of the Lords Spirituall and Temporall and of the Commons in

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this p'sent Parliament assembled, and by the authority of the same, that the said Nicholas shalbee and is hereby declared and enacted to be illegitimate to all intents and purposes whatsoever, and to bee incapable and disabled to inherit any of the said honors and dignities, or any other honors, mannors, lands, tenements or hereditaments, as heire or heire male of the body of the said William Earle of Banbury.

" Provided alwais, that all conveyances and assurances whatsoever to which the said Nicholas hath been in any waies party or privy, or wherein the said Nicholas hath been any way menc'oned by the name or stile of Earle of Banbury, Viscount Wallingford, Lord Knollys, or any of them, and all legall p'ceedings wherein the said Nicholas is menc'oned by the said names or stiles, or any of them, shalbee of such force and effect, and noe other, as if this Act had not beene made.

" And be it further enacted, that the said Nicholas shall for the time to come be called and stiled Nicholas Vaux, it being heretofore his reputed name, and hee being seized of the greatest parte of the estate of the late Lord Vaux, with whom the said Countesse did intermarry after the death of the said William Earl of Banbury."

Although a few precedents existed for an Act of the kind[1], there was peculiar injustice in this measure, because the *legitimacy of the party had been unimpeached for twenty years:* he had actually exercised the most important privileges of legitimacy, by sitting and voting as Earl of Banbury; and his right had been admitted after *two,* if not *three,* investigations by the House of Lords. An ex post facto law, to divest a man of rights, thus publicly acknowledged, and long enjoyed, without the commission of any crime, was repugnant to justice:

[1] *Vide* pp. 59, 60. 87, antea.

and this consideration seems to have had its proper weight, for *the Bill was abandoned after the first reading*; and the Earl consequently *continued in possession of his legal status.*

The writ of summons was, however, withheld; and finding it useless to resist the efforts of those Lords who opposed his claim, Lord Banbury did not again press it for several years: but he never relinquished the title; nor did he in any way whatever acquiesce in the conduct of the House of Lords.

It is difficult, at this distance of time, to ascertain the names, or the real motives of the Peers who took so conspicuous a part in opposing Lord Banbury's case; but the repeated refusal of the House to adopt the Report of its Committees must, it is presumed, have originated with some powerful personage; and it was stated in the petition of Charles Earl of Banbury in 1698, that the influence of the Duke of York, afterwards James the Second, was exerted against his father[1]. The facts that Lord Banbury did not renew his claim whilst Lord Clarendon held the Great Seal, and that he did so, soon after the retirement of that personage from the Chancellorship, render it probable that that eminent statesman and the Duke of York (who had married Clarendon's daughter), were his most formidable opponents. If this were the case, the difficulty of establishing a legal right before a tribunal composed chiefly of lay Peers, whose minds were biassed by a popular prejudice, and by the desire to please the heir presumptive of the Crown, must have been insurmountable; and it would have been surprising if Lord Banbury had not waited for more auspicious times. The case remained in the same state for eight years, during which period nothing occurs on the Lords' Journals respecting it[2].

[1] *Printed Evidence*, p. 42. [2] *Ibid.* p. 61.

Case of the Earldom of Banbury, 1669.

On the 26th of October 1669, the following entry was made in the Journals: "Upon the calling of the House of Peers this day, the House taking notice that the Earl of Banbury's name is not on the list by which the Lords were called, it is ordered that it be referred to the Committee for Privileges to examine why the said Earl of Banbury's name is left out of the said list, *he having formerly sat as a Peer in this House*, and to peruse all former proceedings in this House concerning him, and to make report thereof unto the House." This motion probably originated with some friend of Lord Banbury, with the object of bringing the subject again into discussion. The Committee met on the 24th of November, when the order made in 1628 respecting Precedency, the Report of the Committee of Privileges of the 19th of July 1661, and the proposed Bill for illegitimating the Earl, were read; and it was agreed to report their proceedings to the House, and that Sir Edmund Walker, Garter King of Arms, should attend the Committee at its next meeting.

On the following morning Garter attended accordingly; and on being asked why the Earl of Banbury's name was left out of the list of the Nobility? he seems to have alleged that the late Earl died without issue; and produced from the records of the Herald's office, as his authority, a certificate said to have been taken by one of the Pursuivants of Arms, by which it appeared that William Earl of Banbury died on the 25th of May 1632, that he married two wives, and died without issue. Garter also stated, that in the year 1640 there were two Parliaments, in the proceedings of which there was no mention of an Earl of Banbury in the list[1]. On the same day the Earl of Essex reported the proceedings of the Committee to the House. The Report noticed the

[1] *Printed Evidence*, p. 65.

examination of Garter King of Arms, and that the above were the reasons why that officer had not included Lord Banbury's name in the list of Peers delivered by him to the House. In reference to the second part of the order, which was to present an account of the former proceedings respecting the Earl of Banbury, the Committee stated what took place on the 6th and 15th of June, and on the 1st, 10th and 19th of July 1661; that on the 9th of December in that year a Bill was read a first time, declaring the Earl to be illegitimate; and added, that "this being all the proceedings which the Committee finds concerning the Earl of Banbury, they leave the business to the consideration of the House[1]."

Case of the Earldom of Banbury, 1669.

The only part of this Report which calls for remark is, that it does not notice the fact that on the 10th of July 1661, when the House again referred the claim to the Committee for Privileges, it ordered the Committee to consider "the matter of the right of Precedency," which, for reasons that have been given[2], admit of the inference that the opinion of the House was in favour of the claimant. The document produced by Garter was again offered in evidence in 1810, but was declared to be *inadmissible*; and the fact that no Earl of Banbury is mentioned in the list of the Peers of Parliament in 1640, is accounted for by the Earl's being then a minor, it not being then usual to insert the names of Peers who were under age, in such lists[3].

On the 23rd of February 1670 the Earl of Banbury presented a petition to the House of Lords, stating "that he had the honour to be a Peer of this Realm by descent, and is legally entitled by right of inheritance to the dignity and honour of Earl of Banbury, and ought

1670.

[1] *Printed Evidence*, pp. 66, 67. [2] *Vide* p. 382, antea.

[3] "The Earls of Oxford and Winchelsea, Lords Delawarr, Chandos, Petre, and Teynham, were *also minors*, and their names *are likewise omitted*." Mr. *Townsend*'s MSS. *Le Marchant*'s Report of the *Gardner Case*, p. 398.

Case of the Earldom of Banbury, 1670.

therefore to have and enjoy his voice and seat in Parliament, and all other privileges and pre eminences to such dignity belonging, and hath always in all taxes and payments of poll-money and benevolences, paid such sums, and in such proportions as to the quality and degree of an English Earl did appertain;" that nevertheless he had not yet received a writ of summons to Parliament, "Wherefore, since he is well assured that no legal impediment can be objected and proved against him, he most humbly prays this honourable House that he may receive such a writ of summons to the Parliament now sitting as may enable him to serve his Majesty there according to the duty of his place and quality[1]."

This petition is remarkable for being *addressed* to the *House* instead of to the *King*, and for the terms in which it is worded. The Earl boldly affirmed that he *was* "a Peer of the Realm," and that "no legal impediment could be proved against him." He did not *claim* the *dignity* of Earl of Banbury, for to that he was, he said, "legally entitled by right of inheritance," but he merely claimed a right, *incidental to the dignity*, namely, a writ of summons to Parliament, which writ the Crown had on a previous occasion withheld from a person whose right to the dignity of a Peer the Crown did not question, or intend to impeach[2]." The Peer thus aggrieved petitioned the House to interfere, because such a refusal was a breach of its most important privilege, and its intercession with the King was successful. Lord Banbury followed the same course on this occasion, and wisely avoided the appearance of *claiming* a *dignity*, the title of which he had uninterruptedly enjoyed for twenty-four years, and his right to which had

[1] *Printed Evidence*, p. 67.

[2] The case of the Earl of *Bristol*, temp. Car. I.

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been recognised by his having sat in Parliament as a Peer for some time after a doubt was raised of his right to do so; by the Reports of two Committees for Privileges; by the abandonment of the efforts against him in 1660; and by the relinquishment of the Bill declaring him to be illegitimate, in 1661. He, moreover, astutely reminded the House of the inconsistency and injustice of the Crown in denying him the privilege of a Peer, whilst it exacted from him the pecuniary burthens attached to that rank.

After this petition was read the House ordered it to be referred to the Committee for Privileges, who were to report their opinion to the House. *No proceedings however took place*[1]; and in less than four years afterwards the Earl of Banbury died, which event is thus recorded in the parish register of Boughton, in Northamptonshire: "1673. The Right honourable Nicholas Earl of Banbury departed this life March the 14th, about eleven or twelve o'clock in the night, 1673–4." His widow, who administered to his effects by the title of "Countess of Banbury," died at Harrowden Magna on the 6th of March 1630, and was buried at Boughton on the 10th of the same month, in the entry of the register of which church she is described as "the Right honourable Lady Ann Countess of Banbury, widow of the Right honourable Nicholas Earl of Banbury[2]."

It thus appears that the Earl of Banbury bore the title without interruption from the moment his brother died to the last hour of his existence, a period of twenty-seven years; and on his demise, it was immediately assumed by his eldest son, Charles Knollys, then about eleven years of age, who was baptized at Boughton on the 3rd of June 1662 as "Charles Viscount Wallingford, son and heir apparent of the Right honour-

[1] *Printed Evidence*, p. 68.

[2] *Ibid.* p. 29.

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able Nicholas Earl of Banbury and the Lady Ann his wife [1]."

1685.

Charles, third Earl of Banbury, attained his majority in June 1684, and in the very next year, 10th June 1685, he petitioned the House of Lords, stating the creation of "his grandfather, William Earl of Banbury;" that the said Earl had issue by his wife, Elizabeth Countess of Banbury, Edward, late Earl of Banbury, his eldest son, and also Nicholas, late Earl of Banbury, his second son, the petitioner's father. He then stated that both of them "did enjoy the title and honour of Earl of Banbury;" "that the title and honour of Earl of Banbury is thereby lawfully descended on your petitioner, and in right thereof your petitioner ought, as he is advised, to serve in this present Parliament, and there to have place as Earl of Banbury, according to the date of the said letters patent, being of full age. But not having been summoned to this present Parliament, he prayed their Lordships' consideration of his case, and to represent the same to the King's most Excellent Majesty, to the end he may be relieved, according to right [2]." In this petition the error was avoided of irritating a part of the House by insisting upon a Precedency beyond the date of the patent.

The Lords' Journals of the 10th of June 1685 state, that "upon reading the petition of a person that claimeth the title of Earl of Banbury," it is ordered "that it be referred to the Lords' Committees for Privileges to examine all former proceedings of this House, relating to that case, and report the same to the House [3]." On the 20th of June the Committee met, and determined to report the purport of what took place in July 1660, as well as in June and July 1661; and the Reports of the

[1] *Printed Evidence*, p. 30. [2] *Ibid.* pp. 68, 69. [3] *Ibid.* p. 68.

Committees on those occasions, together with the proceedings in November and December 1661, October 1669, and February 1670, which Report was presented to the House on the 23rd of June, when it was ordered "that this House will hear his Majesty's Attorney-general on his Majesty's behalf against the said claim, as also counsel for the person who claims the said title of Earl of Banbury, on the 6th of July[1].

Case of the Earldom of Banbury, 1685.

On the 2nd of July 1685, four days before the day appointed for hearing the claim, Parliament adjourned until the 4th of August, and again from that day until the 9th of November. It met on the 10th of that month, but did not sit after the 20th of November, on which day it was prorogued to the 10th of February 1686, and from that time, by various prorogations, to the 2nd of July 1687, when it was dissolved[2]; and no other Parliament was summoned during the reign of King James the Second.

In this state the claim stood at the accession of William and Mary in February 1689. For more than thirty years the House of Lords had carefully abstained from coming to a decision on the subject; and after rejecting two Reports from its Committees for Privileges in favour of the claimant, it met every demand on his part by again referring his petition to the Committees, with directions to report what had already taken place; yet *when those Reports were presented, the House would proceed no farther.* If the House of Lords had not been convinced of the *legal* right of the claimant, it is not likely that it would have hesitated a moment in pronouncing judgment against him; but as the Law then stood, it was impossible to declare him illegitimate; hence it seems that the strict and impartial administration of the Law was, in this case, impeded in

1689.

[1] *Printed Evidence*, pp. 68–74.

[2] *Ibid.* p. 74.

Case of the Earldom of Banbury, 1689.

its course by the existence of feelings which ought never to enter the breasts of men exercising judicial functions. The conduct of the House on the subject has fortunately only one precedent in the modern history of this country[1]; and it could not possibly have occurred in any of the Courts of Common Law, without producing the impeachment of those who presided over them. Let it for a moment be supposed, and the analogy is the closest of which the case admits, that a man had instituted proceedings for the recovery of a freehold estate, that the point turned upon his legitimacy, that a Jury had found him legitimate, that a new trial had taken place, and that another Jury had come to the same conclusion, what would be said, if any of the Courts of Common Law were to withhold from the plaintiff the rights to which those verdicts entitled him ? It is true that a Committee for Privileges, and the House itself, bear slight resemblance to a Jury, or to Judges in a Court of Common Law ; and the difference between them operates most materially against a claimant to a Peerage : but in proportion to the importance of the object, and to the peculiar constitution of the Court, which, in practice, possesses exclusive jurisdiction on the most valuable right of inheritance known to the constitution of England, *ought to be* its *rigid adherence to*, and its *speedy* and *impartial administration, of the Law.*

Injustice, or a vexatious delay of justice, in any other Court, may be remedied by appeal or impeachment; but there is no mode in which a man who asserts that he has inherited a Peerage can hasten his cause to a decision. The House of Lords may hear his claim when it pleases; adjourn the proceedings as often, and for as long a time as it thinks proper; Lords may or may not attend in sufficient numbers to form a Committee

[1] That of its own proceedings in the *Purbeck* case. *Vide* antea.

for Privileges; the petitioner may be met by repeated references to former proceedings; and in a word, there are no limits to the modes in which a decision may be avoided, and the resources and patience of a claimant exhausted. Nor are these the only difficulties with which a claimant has had to contend. Years have sometimes elapsed between the opening speech of his counsel and the decision. Many of the Lords who may be called upon to give their votes, probably never heard one word of his counsel's address; whilst from the long interval which may have occurred since it was delivered, other Lords may have forgotten both the facts and the argument. His counsel who opened the case may have died or been promoted to the Bench before its termination; and the speech on summing up the evidence on his behalf is always answered by the Attorney-general on the part of the Crown, upon which it is not now permitted to reply. It must, however, be observed, that in the case of unfounded claims, this system is also pregnant with danger to the rights of the Crown, and of those of the Peerage, for if, from the lapse of time, the facts and reasoning in a support of a *just* claim are forgotten, so may the arguments which have exposed the false statements of an unfounded claim, more especially as the allegations of the petitioner are not always properly investigated. Under disadvantages which are incidental to no other tribunal, the House pronounces its resolution, which is without appeal; and if, as has been contended, it is in some cases final, there are no means of remedying any injustice which it may have committed.

Case of the Earldom of Banbury, 1693.

The case of the Earldom of Banbury is a striking example of the effects of this system. At the period when the claim was originally made, and even in 1693, when the House first pronounced its resolution against it, the Law was so decidedly in favour of the claimant's right,

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that it was admitted by the Lords' Committees in 1661; and in 1693 those Lords who were opposed to the claim refused to take the opinion of the Judges on the subject. But after 1693 an important change was supposed to have occurred in the Law; and it will be shown that the question was ultimately decided upon principles totally at variance with the Law as it stood in 1631, when the right accrued, and for many years afterwards.

An event, however, at length occurred, which rendered it imperative upon the House of Lords to pronounce its decision upon the claim.

Charles, third Earl of Banbury, who petitioned the House in 1685, had the misfortune to kill his brother-in-law, Captain Philip Lawson, in a duel, for which offence he was indicted on the 7th of December 1692, by the name of "Charles Knollys, esq." He immediately presented a petition to the House of Lords, which was read on the 13th of that month, alleging himself to be Earl of Banbury and a Peer of the realm, stating that he had been indicted for the murder of Philip Lawson, and praying to be tried by his Peers. It was ordered, "that this House will hear his Majesty's Attorney-general on his Majesty's behalf (and all other persons that may be concerned therein), against the said claim, as also counsel for the person who claims the said title of Earl of Banbury, on Monday the 9th of January [1]."

On the 9th of January 1693, Mr. Finch and Sir Thomas Powis were heard before the whole House as counsel for the Petitioner, and the Attorney-general for the Crown. The Petitioner's counsel stated the pedigree, and that his father sat in the Convention Parliament of 1660, after the King's return, but was not summoned to the next Parliament; and referred to the proceedings of the House on the subject. They then

[1] *Printed Evidence*, p. 75.

argued that no man ought to have his illegitimacy[1] questioned after his death; that the only question was, whether he was born in wedlock, which did not appear to be disputed; and that if children are born in wedlock their legitimacy is not to be questioned[2].

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The Attorney-general, Sir John Somers, said, that as this matter had been several times before the House the King did not think proper to interpose in it, but would remain passive; that he would leave it to the judgment of the House; and that when the House had determined he would do what was proper. The Speaker then reported; and the House ordered that the two Inquisitions of 1633 and 1641 should be produced on the ensuing Saturday; that the Heralds should attend and bring with them all papers and matters relating to this business; and that the Attorney-general should also attend and be further heard, if he thought fit, on his Majesty's behalf, and all others that may be in any way concerned[3].

On the appointed day, Saturday the 14th of January 1693, the Inquisitions were produced, and the Heralds being examined, said that they had only one document, which was the certificate taken after the death of William Earl of Banbury. That certificate, which has been before alluded to, was read, and it was stated by the Heralds that as the Earl's funeral was private, the certificate was taken by Sampson Lennard, Blue Mantle, but that if it had been a public funeral the Heralds would have taken it; and they added, that that certificate had been many years publicly in their office, and that they had nothing more. Mr. Finch, one of the Petitioner's counsel, pithily observed, "We attend to hear what *objections* are made: we hope *this is none*;" and Sir Thomas Powis added, that "these matters were of little credit; that Sir William Dugdale had printed[4]

[1] *Sic.* [2] *Printed Evidence*, p. 75. [3] *Ibid.* p. 76.
[4] *Baronage*, 413.

Case of the Earldom of Banbury, 1693.

what was false, namely, that this certificate was signed by the Countess; that now a man's life was in question, which made things mighty different from all the claims in former time in this case."

It was then asked, apparently by the House, "what estate William Earl of Banbury the now person inherits; there is something, they say?" The reply was, "a bowling-green at Henley;" and to the question of what had become of the lands? it was answered, that they were "settled and given away by William Earl of Banbury[1]." The Solicitor-general, Sir Thomas Trevor, having appeared at the bar, he was asked, "how he came there," and replied, that the papers were put into his hands by the Attorney-general's secretary. The House then resolved to hear the Solicitor-general, pursuant to the order of the 13th of December that the Attorney-general should be heard; but a debate ensued respecting the attendance of the Attorney-general as an assistant to the House, when it was ordered that an address should be presented to the King for that purpose, and it was referred to the Committee for Privileges to prepare it[2]. The Attorney-general, however, attended before the conclusion of the debate, as he, and not the Solicitor-general, addressed the House, the brief notes of whose speech will be given as they occur on the minutes. There is reason to believe that Sir John Somers, who was one of the most distinguished constitutional lawyers of that, or any other age, acted very unwillingly; for, in the first instance, he declined taking any part in the proceedings on behalf of the Crown: he then kept away, and sent the papers to the Solicitor-general; and when he did address the House, he thought it necessary to commence his speech by attributing the alteration in his intention of taking no part in the business to the King's commands[3].

[1] *Printed Evidence*, p. 77. [2] *Ibid.* pp. 77, 78. [3] *See* p. 403.

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"Mr. Attorney:—Upon his Majesty hearing of this farther, his Majesty hath given me order to object what I can. The King seems surprised that one should come to ask to be tried as a Peer before he asks the King for a writ of summons. It is sixty years since the Earl of Banbury's decease, and since no Earl of Banbury hath been owned by the Crown. It is hoped all the circumstances of the person will be very narrowly looked into, you make him in capacity of being a judge into the Legislature; nay, I know not but you give him an estate too. The Earl of Banbury died; how can the petitioner entitle himself to be Earl of Banbury? It will not be pretended that the Earl knew he had a son; nay that he ever knew his wife had a son; there was an Inquisition taken in Oxfordshire, the proper county. Dugdale says she the oath[1] subscribed a certificate her husband died without issue. This second son was not heard of in many years; all that is pretended is that these children were born in wedlock. *Hospell* and *Collins*'s case cited, tried in Common Pleas, he is no child during the coverture not heard of, nor that the mother had any child. The question is entire, whether Nicholas was legitimate or not as if he was living: his death will not alter the case. He had no part of the estate of Lord Banbury but Vaux. I shall be told there was another Inquisition, but this was an artifice; the first Inquisition was never quashed. As to Nicholas's sitting in the Convention, will be little in this case. The Committee was of one opinion, and the House was of another opinion, by bringing in a Bill. It will be very strange to admit him a Peer after this proceedings[2]."

This speech contains little that is deserving of observation. Its weakness, which is obvious, must be imputed to the consciousness of the speaker that the *legal*

[1] *Sic.*

[2] *Printed Evidence*, p. 78.

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right of the claimant was indisputable. The objection that the petitioner had not applied for a writ of summons to the King, only refers to the monarch then on the throne, which omission may have arisen from various causes; for the claimant did petition the House for a writ in 1685, and his father had repeatedly done so without success. As the Crown gave its assent to a Bill in which Nicholas was styled "Earl of Banbury;" as it must have known that he sat and voted as a Peer in Parliament for several months; and as he had been assessed to the poll-tax as an Earl, it was not true that no Earl of Banbury had been "owned by the Crown" since the first Earl died. Sir John Somers assumed that the Earl was not aware of his wife's having had a son, and noticed the Inquisition of 1633; but he cautiously refrained from adverting to the presumption of law in favour of the legitimacy of children born in wedlock. His assertion, that the second Inquisition was an artifice, and that the first was never quashed, was unsupported by any evidence, or even argument, and has been refuted in a former part of these observations. Oxfordshire was not a more "proper county" than Berkshire: on the contrary, the greater part of the Earl's lands were in the latter county. Dugdale's statement, that the Countess subscribed a certificate that her husband died without issue, has been disproved; and even if she had done so, her declaration could not rebut the legal presumption in favour of her children's legitimacy, for the declaration or act of a married woman cannot bastardize her offspring [1].

To the objection, that "the son was not heard of in many years," it is a sufficient answer that Nicholas, the petitioner's father, was a *second* son, and was an infant at the Earl of Banbury's death; but it is unquestionable that he was avowed as Lady Banbury's son as early as

[1] *Vide The King* v. *Rock*, p. 136, antea.

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1641, when he was ten years of age; that he assumed the title the moment his elder brother died; and that he had twice married, by that title, into noble families before the Restoration. *Hospell* and *Collins*'s case is not reported; and some remarks have been submitted to show that it did not affect the law of legitimacy under which the petitioner claimed [1].

The Attorney-general insisted, in answer to the observation of the petitioner's counsel, that a man's legitimacy could not be questioned after his death, that the question stood as if Nicholas was then living; but as the House of Lords in 1661 did not venture to declare him illegitimate, as two of its Committees admitted his legal right to the Earldom, as the Act, which, according to the statement in the Bill itself, was the *only measure by which he could be bastardized*, was not proceeded with, and as he bore the title of Earl of Banbury, without any opposition, from the time he succeeded to it in 1646, until his decease in 1674, there was much cogency in the remark that he could not be declared illegitimate after his death. It is true that the Crown withheld the writ of summons to Parliament; but this might have proceeded from other causes, and not only proves nothing with respect to his legitimacy, but it does not even affect the right to a Peerage. "The Committee was," the Attorney-general added, "of one opinion, and the House was of another opinion, by bringing in a Bill;" but he omitted to state the important facts, that the words of the order of the House in 1661, after hearing the case, by which the matter was referred again to the Committee for Privileges, admit of no other fair construction than that the House was then disposed to act upon the first report of the Committee; that the second reference arose from a point of form, to settle the ques-

[1] *Vide* p. 122, antea.

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tion of Precedency; that the Bill for declaring the Earl illegitimate was abandoned; and that the House never came to any decision upon the claim. It was avowed that the Bill was indispensable to effect the purpose for which it was introduced; and it would be a waste of words to insist upon a proposition which is self-evident, namely, that whatever was the legal *status* of the individual *before* the Bill was brought in, *continued* to be his *legal status* for the *rest of his life, because* it was never even *read a second time.* If a Bill which was never passed can be allowed to prove any thing, the proposed Act for illegitimating Lord Banbury proves, to use its own words, that the "*illegitimation of children born in wedlock can no way be declared but by Act of Parliament.*" The Earl was born in wedlock; and if he could only be rendered illegitimate by an Act of Parliament, and if no Act of Parliament ever passed for that purpose, it follows, upon every principle of reasoning, common sense, and sound Law, that he *was* and *continued to be legitimate.*

Nothing could be more just, in a constitutional point of view, than the opinions of the Earls of Anglesey and the other Peers, who twice protested against a similar Bill, in the case of Robert Villiers, in 1678; and the following extracts from those protests apply with equal force to Lord Banbury:

"*By bringing in a Bill to bar him,* his *right* to the said title *is confessed;* for he *cannot be barred of anything which he hath not right to,* and this renders the proceedings in this cause contradictory and inconsistent." "It seems against common right to bar any by Bill, who claims a legal title, without forfeiture be in the case; and if so, there needs no Bill." "We conceive this course, in the arbitrariness of it, against rules and judgments of Law, to be derogatory from the justice of

Parliament, of evil example, and of dangerous consequence both to Peers and Commoners[1]."

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Mr. Finch was heard in reply to the Attorney-general, (a fact which is deserving of notice, as it is now held in the House of Lords that a petitioner's counsel has not the right of reply upon the Crown[2]), who said that "the matter desired was very great, that this question did not decide the title to the lands, and that the Attorney-general had said it was strange at this time to set this matter on foot, but the occasion was great, as the petitioner lay under the misfortune of being supposed to have killed a man." Sir Thomas Powis was again heard for the petitioner; but nothing is preserved of his speech[3]. Counsel were then ordered to withdraw, and "the House went into debate of the case;" but the opponents of the claim adopted their former tactics, by adjourning the discussion; and the House divided on the question "that the House shall now proceed in the debate," which was negatived by a majority of fifteen; twenty-three Peers

[1] *Vide* p. 109–111, antea.

[2] Many modern precedents may be cited of counsel for claimants of Peerages having replied to the Attorney-general; and it is submitted, that the *justice* of *every case* requires that he *should be permitted to answer the objections which may be taken by the Attorney-general,* though the right of *final* reply might always remain with the Crown. During the claim to the Earldom of Banbury, in June 1808, the petitioner's counsel tendered some documentary evidence, which was objected to by the Attorney-general. Two of the claimant's counsel, namely, Sir Samuel Romilly and Mr. Hargrave, "were then heard in support of the same; and Mr. Attorney-general in reply; and Mr. Attorney-general introducing new objections, Sir Samuel Romilly was heard in answer to the same, and Mr. Attorney-general again in reply." Towards the conclusion of the case, on the 5th of June 1810, the Attorney-general was heard on behalf of the Crown. On the 14th of that month Sir Samuel Romilly was heard in reply; and two days afterwards the Attorney-general was heard in reply. It is somewhat remarkable, that one year afterwards, viz. on the 2nd of April 1811, *additional* evidence was allowed to be put in on the part of the Crown. So lately as in the claim to the Barony of L'Isle, in April 1826, the petitioner's counsel was heard in reply to the Attorney-general; and that officer did not then claim the right of answering his observations.

[3] *Printed Evidence,* pp. 78, 79.

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being in favour of proceeding, and thirty-eight being for the adjournment until the following Tuesday, when it was ordered to be taken as the first business[1].

The House accordingly met on Tuesday the 17th of January 1693. After causing the two original Inquisitions to be read, and having ascertained that the commissions for taking them could not be found, the House went into debate on the claim. It was then "moved that a vote be made that the Petitioner is the son of a supposititious child to the Earl of Banbury;" but this motion does not appear to have been pressed; and after further debate the House was moved "that *all the Judges be heard in this case such questions as shall be asked relating to the points in Law in this case,*" and after a debate the question was put, "whether all the Judges shall be heard in this case?", which was *resolved in the negative,* by a *majority* of *nine,* the contents being twenty-nine and the non-contents thirty-eight[2].

Against this extraordinary decision the minority asked leave to protest; and the question was then proposed, "whether the Petitioner hath any right to the title of Earl of Banbury?", which was met by the minority moving that the previous question be put, "whether this question shall be now put?", which was resolved in the affirmative, by a majority of thirty-three to twenty-seven, seven of the contents and two of the non-contents being proxies. Then the main question being put, "whether the Petitioner hath any right to the title of Earl of Banbury?", it *was resolved in the negative*; and it was ordered that, "the Petition presented to the House on the 13th of December last, by a person claiming the title of Earl of Banbury, shall be, and is hereby dismissed this House[3]".

The minutes of the proceeding do not give the num-

[1] *Printed Evidence,* p. 79. [2] *Ibid.* p. 80. [3] *Ibid.* pp. 81, 82.

bers of the majority and minority who divided upon the main question; but as no less than *twenty Peers* recorded their dissent from the resolution, it is certain that the majority was small[1]; and it is a remarkable feature in the case, that with only a single exception[2], *every one of the sixteen Peers who protested against the refusal of the House to hear the Judges on the point of Law, recorded their dissent from the resolution against the claim*[3].

The House of Lords was thus at last compelled, after evading the measure by various and vexatious delays for thirty-two years, to pronounce its decision upon the claim to the Earldom of Banbury; but its proceedings on the occasion were ill calculated to produce confidence in its justice, or to prove that its judicial functions

[1] It is stated in a MS. note to a copy of Dugdale's *Baronage*, in the Author's possession, (vol. II. p. 413), which appears to have been written about the time of these proceedings, that the majority consisted of *eight votes only*. So much of the following passage as is printed in *italics* is the MS. addition to Dugdale's account of the Earl of Banbury, who concludes his statement in these words: "And departing this life 25 Maii, an. 1632 (being then eighty-eight years of age), lyeth buried in the church of Grays, before mentioned. But notwithstanding this, her [the Countess's] certificate, and an inquisition taken after his death, importing as much; it was not long after, ere she married, Nicholas Lord Vaux, and produced two sons; viz. Edward, who by reason of a suddain quarrel, hapning on the road-way, betwixt Calais and Gravelin, was there slain, and buried in the church of the Friers Minims at Calais; the other, Nicholas, was frequently called Earl of Banbury, but never had summons to Parliament."——"*And ever disputed title till his death (which happened in . . . . . He marryed the Lady Montjoy, aunt to the late Earl Newport, and left a son, Nicholas, who calls himself Earl of Banbury: and had y^e^ Lord Vaux estate, but denyed peerage by 8 votes in y^e^ Lords' House: He is marryed and hath issue . . . . . But y^e^ estate of Grays was left to S^r^ Francis Knowles, his issue, lately extinct.*"

[2] Lord Lempster.

[3] The following Peers protested against the resolution of the House that the Judges should not be consulted; *viz.* the Marquesses of *Cærmarthen* (then Lord President of the Council) and *Halifax*, the Earls of *Mulgrave*, *Montagu*, *Marlborough*, *Manchester*, *Huntingdon* and Lindsey; the Lords *Ashburnham*, *Lexington*, *Lempster*, *Grey*, *Godolphin*, *Scarsdale*, and the Bishops of *London* and *Winchester*. The Lords whose names are printed in *italics*, as well as the Lords Crewe, and Hunsdon, and the Bishops of Llandaff, St. David's and Peterborough, also protested against the resolution which negatived the claim.—*Printed Evidence*, pp. 81, 82.

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were exercised with a due regard for the Law of the land. The question at issue was purely one of *Law*; and many of the Peers very properly proposed that the House should avail itself of the legal assistance which the constitution has assigned to it, by *consulting* the *Judges*. Yet a tribunal, composed, with few exceptions, of *laymen*, exercising judicial functions upon a right of inheritance which depended entirely upon a *point of Law*, and from whose judgment there was no appeal, *refused to consult the Judges!* Monstrous as such a proceeding appears, it was aggravated by the fact, that on the *two* former occasions when the House allowed the case to be investigated by its Committees for Privileges, those Committees not only reported that the claimant *was legitimate*, but the *House sanctioned* the introduction of a Bill *founded upon the legal right* of the claimant, and which expressly *stated* that he *could not be deprived of that right except by an Act of Parliament*. The motion to consult the Judges, emanated from the Peers who were in *favour* of the claim; and no stronger proof could be given of *their desire, that the case should rest upon its legal merits alone*, than that proposition; whilst the refusal to accede to it on the part of the majority, who afterwards rejected the claim, shows that they were unwilling to submit it to such a test, and clearly indicates their anticipation of what would have been the opinion of the Judges on the point of Law.

The indictment of Charles Earl of Banbury had been removed by *certiorari* from Hicks's Hall into the Court of King's Bench in Hilary Term 1693, when he was brought to the bar from Newgate, to which prison he had been committed by the name of "Charles Knollys, esquire;" and being arraigned, he said he was the person indicted, but pleaded a misnomer in abatement. His plea recited the letters patent of the Earldom to William

Knollys, Viscount Wallingford, and the heirs male of his body, and his pedigree as heir male of the body of that person, and concluded with an offer "to verify all these facts;" and, therefore, "he not being named Earl of Banbury in the indictment, prayed judgment of it, and whether he ought further to be compelled to answer to it[1]." Against this plea the Attorney-general insisted that he ought to answer to the indictment, because he had petitioned the House of Lords in December 1692 to be tried by his Peers, and the House had, on the 17th of January following, resolved that he had no right to the title and honour of Earl of Banbury, and had ordered his petition to be dismissed. The Earl demurred to this replication, and the Attorney-general joined in demurrer. The case appears to have been delayed by various motions about the pleadings, bailing the defendant, and arguments of Counsel, for above a year, namely, until the 22nd of March 1694, when the House of Lords interfered by ordering the Attorney-general "to give the House an account in writing of the proceedings of the Court of King's Bench against the person who claims the title of Earl of Banbury." The Attorney-general stated the facts above mentioned on the 11th of April in that year, when the House ordered that such of the Judges of the Court of King's Bench as were then in town, and not sick, or, as the order afterwards stood, all the Judges then in town, should attend the House on the following Saturday, which day was afterwards altered to Monday; and that all the Lords be summoned to attend[2].

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1694.

The Journals of the House, of Monday the 16th of April, do not contain any notice of this order being complied with; and it appears from the MSS. of Sir Edward Ward, then Attorney-general, that on that day the paper which he delivered in to the House a few days before was read, and that "on Chief Justice Holt being called

[1] *Printed Evidence*, pp. 83, 84.

[2] *Ibid.* pp. 83 to 86.

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upon, he said that he was a stranger to the paper, and prayed a copy, but withal said there had been no delay from the Court; that the cause was new, and fit to be argued again; and next term the Court would be full, and would give judgment, according to custom; and after judgment it might come to the Lords' House by error, and so upon that it stood next term over." Parliament was prorogued on the 25th of the same month, and the next session did not commence until the 12th of November following.

In the meantime the Court of King's Bench proceeded on the misnomer plea of the defendant, by hearing further arguments of Counsel; and in Trinity Term 1694 the Court expressed its opinion against the sufficiency of the Attorney-general's replication, and adjudged that the indictment against the defendant, by the name of 'Charles Knollys, esquire,' should be quashed, and that he should thence *sine die*. This judgment, which involved points of great constitutional importance, is said to have been given with the unanimous consent of Lord Chief Justice Holt, Sir Samuel Eyre, Sir Giles Eyre, and Sir William Gregory, the four Judges of that Court. As it will be found in various Reports[1], and was published separately in a small tract[2], it is unnecessary to do more than to extract those parts of the judgment of the Court which

[1] *Skinner*, 336. 517; 1 *Raymond*, 18; 2 *Salkeld*, 509; 12 *Modern*, 55; *Carthew*, 297; *Comberbach*, 273; *Tremaine*, 11; and 8 *State Trials*, 50.

[2] "The Arguments of the Lord Chief Justice Holt and Judge Powell in the controverted point of Peerage, in the case of the *King* and *Queen* and *Knollys*, otherwise Earl of *Banbury*." 1716. As no Judge of the name of Powell sat in the King's Bench in 1694, and as there is nothing to show that the whole argument did not proceed from Chief Justice Holt, it is difficult to understand the meaning of the title to this tract. Sir John Powell, who, in 1695, became a Justice of the Common Pleas, may have assisted Chief Justice Holt in preparing his argument, and may have been counsel for the defendant.

This tract was reprinted by Sir Egerton Brydges in 1823. Mr. Hargrave's learned preface to Lord Hale's *Jurisdiction of the House of Lords*, p. 183, will be read with advantage on this subject.

bear immediately upon the right of the claimant to the Earldom of Banbury.

Case of the Earldom of Banbury, 1694.

Mr. Justice Eyre, who delivered his opinion first, said that the defendant had a title to his honour by legal conveyance, and that it was under the protection of the Common Law, and could not be taken from him but by legal means; that the House of Lords could no more deprive one of a Peerage than they could confer a Peerage; that the defendant's right stood upon the letters patent and his legitimacy; that the letters patent could not be cancelled without a *scire facias*, and that the defendant could not now be proved a bastard or illegitimate.

Lord Chief Justice Holt, who is stated to have been "more explicit than the other Judges," and whose argument "was delivered with greater reason, courage, and authority, out of our books [1], objected to the resolution of the House of Lords, that it was only an opinion and not a judgment; that they had no jurisdiction in cases of Peerage," except "upon a petition the Crown refers the matter to them, which gives them a jurisdiction which before they had not, and no such reference had occurred in this instance;" that "the defendant having by his plea entitled himself to an estate tail in the honour under the letters patent to Viscount Wallingford and the heirs male of his body, as a lineal descendant under that entail, he hath a freehold and inheritance in that honour vested in him by the Common Law, to be protected in it, and governed according to the rules of Law, and cannot be disinherited or debarred of it by the known laws of the Kingdom, unless it be *judicium parium*, or *per legem terræ*; that the defendant, nor any other of the descendants of an estate tail, could not in that summary way be bastardized by vote without a lawful trial; which in *general bastardy* must be by *certificate of the Ordinary*,

[1] *Skinner*, 517.

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or in *particular bastardy* alleged, it *must* be *tried by jury*; and then no man by the law can by any means, unless by Act of Parliament, be made illegitimate after his death[1]." The defendant was consequently *set at liberty*, and was *never tried* for the murder of which he was accused.

The judgment of the King's Bench tends to prove that the proceedings of the House of Lords in 1693 were illegal; that if the question of the legitimacy of the claimant had then been tried in the Courts of Common Law, the Judge's charge to the jury would have been decidedly in his favour; and that if the House of Lords had assented to the proposition for consulting the Judges on the point of Law, their opinions would likewise have supported his legitimacy. It is also material to observe, that Mr. Justice Eyre dissented from the Attorney-general's assertion in his address to the House, that the question then stood in precisely the same state as if Nicholas, the petitioner's father, was living, for, whether rightly or not, it was then laid down that a man could *not* be *bastardized after his death*, except by Act of Parliament; and that throughout Lord Chief Justice Holt's argument, that learned Judge always *spoke of the defendant as legitimate*, and *described* him as "Earl of Banbury."

It has been justly remarked, that if the Law Officers of the Crown had deemed this solemn and unanimous judgment of the Court of King's Bench to be questionable, "a writ of error might have been brought to carry the case before the House of Lords for their examination; or had the Law Officers of the Crown seen any

[1] Upon the principle that "Justum non est aliquem post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur." 1 *Inst.* 244. But it was held, in *Boson* v. *Moore*, and in *Pride* v. *Earl of Bath*, (in 6 Will. III.), that the rule that none shall be bastardized after his death holds *only* in the case of *bastard eigne* and *mulier puisne*. 1 *Salk.* 120 3 *Lev.* 410.

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prospect of making out a case in evidence against the legitimacy of Charles Earl of Banbury's father, Earl Nicholas, it was open, on the part of the Crown, to have had a new indictment presented against Earl Charles by the name of 'Charles Knollys, esquire;' and upon its being found, and his again pleading the alleged misnomer in abatement, the Attorney-general on the part of the Crown might have so replied, as to have produced an issue of fact on the legitimacy of Earl Charles's father, Earl Nicholas. But neither of these courses having been taken on the part of the Crown, it appears to furnish very considerable ground for now presuming, that those by whom the Crown was then advised, thought the judgment of the King's Bench according to Law; and at the same time were at a loss for a sufficiency of evidence to impeach the legitimacy of Earl Charles's father, Earl Nicholas, before a jury [1]."

The House of Lords did not, however, pass over the proceedings of the Court of King's Bench in silence. Parliament was not then sitting, but on the 27th of November 1694, a few days after it met, the subject was discussed in the House; and it was resolved, "that the Attorney-general should, on Tuesday the 4th of December, give the House an account "of what proceedings there have been in the Court of King's Bench relating to the person who claimeth the title of Earl of Banbury, since the 11th of April 1694, and that all the Lords be summoned to attend [2]." On the appointed day, the Attorney-general stated what had taken place in the King's Bench; and the proceedings of the House on the 17th of January 1693, when it was resolved that the petitioner had no right to the Earldom of Banbury, were

[1] Printed case of the Earldom of Banbury in 1806, which is said to have been prepared by Sir Samuel Romilly and Mr. Hargrave, p. 25.

[2] *Printed Evidence*, pp. 86, 87.

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then read, and it was proposed to adjourn, but after debate the motion was negatived, and the House ordered that the proper officer in the Court of King's Bench should bring before the House on the following morning "the record of the indictment of Charles Knollys, who claimed the title of Earl of Banbury, and the proceedings of that Court thereupon," until which time the debate was adjourned[1]. On the next day, the 5th of December, the record was accordingly produced; and a debate arose, which was adjourned until the 12th of that month, when the record was again ordered to be produced; but the matter was subsequently adjourned to the 24th of December, and from thence to the 2nd of January 1695. The House, however, adjourned from the 30th of December to the 3rd of January; and no further proceedings took place until January 1698, three years afterwards[2]. Thus, notwithstanding the displeasure manifested by the House of Lords at the conduct of the Judges of the Court of King's Bench, and the intention which it showed of adopting strong measures for the vindication of its dignity, *nothing whatever was done*; and the House consequently submitted to the judgment of the highest Court of Common Law in the realm, to the effect that the proceedings of the House were *illegal*, and that the right of Charles Knollys to the Earldom of Banbury was *wholly unaffected by its resolution*, five years before, that he had "*no right*" to that dignity.

A remarkable case, illustrative of the Law of Dignities, has been recently discovered, which confirms Lord Holt's and Mr. Justice Eyre's opinion, that a Peerage created by letters patent is under the protection of the Common Law, and that the heir under that entail has a freehold and inheritance in the honour, which is founded upon, and governed by the rules of the Common Law, of which

[1] *Printed Evidence*, p. 87. [2] *Ibid.* pp. 88, 89.

he cannot be deprived except by the known laws of the realm. The case alluded to is also deserving of attention from its marking out in the clearest manner the extent of the jurisdiction which the House of Lords formerly possessed over Peerages, and from its drawing a *distinction between the right of inheritance to the title,* and *the right,* which is *incidental to it,* of *sitting* and *voting in Parliament.* The Judges admitted that they had no authority to give an opinion on the question of right to sit in Parliament, which they said belonged only to the King and the Peers, but they considered that the right to the Dignity itself was a point of Common Law, and was consequently within their jurisdiction.

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Thomas Montacute, Earl of Salisbury, died on the 3rd of November 1428, leaving Alice, his daughter and sole heiress, who was then the wife of Sir Richard Neville. The Earldom of Salisbury was granted to the Earl's ancestor, to hold to him and "his heirs," and on failure of issue male, the dignity consequently devolved upon the daughter of the last Earl, whose husband claimed it in her right as tenant by the courtesy, "with the place in Parliaments and Councils, to the Earls of Salisbury from of old time due and accustomed." The Privy Council referred the matter to the Judges, who stated their opinion, "that the son of the daughter and heiress of the Earl, ought to be admitted to all the right and title which that Earl had enjoyed, as ought also the husband of the said daughter, father of such son, in right of his wife; and as she ought to be named and reputed as a Countess, so ought he to enjoy the name of an Earl; but as to the seat in Parliament, it did not pertain to them to take cognizance thereof, but only to the King and the Peers of the realm. The Peers were accordingly questioned in full Parliament, who agreed that Neville should enjoy the title of Earl of Salisbury,

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and a seat in Parliament and Councils, until the King attained his full age; upon which the Chancellor was directed by the Privy Council to carry the said resolution into effect[1]."

Sir Richard Neville was accordingly summoned to Parliament as Earl of Salisbury on the 12th of July following; and he continued to be so summoned to all future Parliaments. Immediately after Henry the Sixth became of age, the Earl obtained letters patent, dated on the 4th of May, 20 Hen. VI. 1442, which recited the limitation of the original patent, the descent of the honour to Thomas Montacute, the late Earl, the birth of Alice, her marriage with the grantee, and that he had issue by the said Alice at the time of her father's death; and granted him 20 *l.* per annum for the support of the dignity.

It has been remarked, "that the whole of this proceeding merits great attention, not only for the precedent which it establishes of the Judges deciding on a claim to a Peerage, but for proving that a tenantcy by the

[1] *Proceedings and Acts of the Privy Council of England in the reign of Henry the Sixth*, vol. III. p. lx. The following is a copy of the original minute of the Council;

"Tercio die Maii, anno septimo [1429] apud Westmonasterium in materia Domini Ricardi Neville qui desponsavit Aliciam filiam et heredem Thomæ nuper Comitis Sarum an idem Ricardus ea occasione debeat admitti ad nomen et omen Comitis Sarum et habere locum in Parliamentis et Consiliis regiis Sarum Comitibus ab antiquo debitis et usitatis; Justiciarii Regii interrogati inter plura alia coram Dominis, responderunt quod omne jus et titulum ad quæ Thomas Comes Sarum ultimus defunctus de jure regni admitti debuit, filius filiæ et heredis suæ debet admitti, et per hoc maritus ejusdem filiæ pater filii predicti ut de jure uxoris suæ; et quod ex quo ipsa uxor nominari et reputari debet pro Comitissa, videbatur eis quod maritus ejusdem debet sortiri nomen Comitis. Quoad locum in Parliamentis et Consiliis Comitibus Sarum debitum dixerunt quod, non pertinet ad eos cognoscere aut dicere ullo modo set solum ad Regem et Pares regni, quibus per Dominos in pleno Parliamento auditis et intellectis interrogati dixerunt quod ipsi possent consentire quod prefatus Ricardus Neville habeat nomen et dignitatem Comitis Sarum ac locum in Parliamentis et consiliis quousque Rex ad plenam etatem pervenerit. Et super hoc dominus Cancellarius de consensu Dominorum subscriptorum premissa mandavit debitæ executioni."—*Ibid.* p. 324.

courtesy existed in a *dignity*, a principle which has long ceased to be admitted, notwithstanding that no regular decision has ever been pronounced against it, and that numerous precedents can be adduced, of persons being summoned to, and sitting in Parliament *jure uxoris*. It is also remarkable, that although the Judges affirmed the right of Neville to the Earldom, the Peers limited his right to sit in Parliament to the termination of the King's minority. No attention appears to have been shown to the anomalies which would have arisen, in case the Peers had refused to admit Neville's right to a seat in Parliament, or in case of the King's not confirming the resolution of the Lords when he became of age; in either of which events, Neville would have enjoyed the name and title of an Earl as a Common-Law right, without that privilege which alone gives real dignity and importance of a Peer—a seat in the House of Peers; a solecism in the constitutional practice of this country, of which, however, modern times afford examples, in the instances of the Peers of Scotland and Ireland [1]."

Case of the Earldom of Banbury, 1691.

Supported by the proceedings of the King's Bench, and, probably, being advised that his legal right was indisputable, the claimant ventured again to agitate the question. Early in the year 1698 he presented a petition to the King, in which he described himself as "Charles Knollys, son and heir of Nicholas, brother and heir of Edward, son and heir of William, late Viscount Wallingford and Earl of Banbury." The petition, after reciting the letters patent creating the Earldom, and stating that the first Earl died seised of the dignity, thus proceeded: "leaving Edward and Nicholas his issue; that Edward died under age and without issue, whereupon the same title descended to your Petitioner's said father, Nicholas, and he became

1698.

[1] *Proceedings and Acts of the Privy Council of England in the reign of Henry the Sixth*, vol. III. p. lxi.

Case of the Earldom of Banbury, 1698.

thereby rightfully entitled to the said name, title, and dignity, and was accordingly reputed, deemed, and taken as Earl of Banbury, and as such sat in the House of Lords in the Convention Parliament, upon the restoration of King Charles the Second; that afterwards some dispute arising concerning the precedency of the said Nicholas, and the influence of the late King James, then Duke of York, prevailing against him, your Petitioner's said father, he was forced to withdraw and forbear the use of his right of sitting in the House as a Peer of this Realm during his life, although he had proved his legitimacy and heirship by four witnesses, sworn at the bar of the House of Peers, and examined at a Committee, who made a report accordingly in favour of his right, as by the proceedings in the House more fully appears; that by his decease the said title and dignity descended to and upon your Petitioner as his son and heir; that your Petitioner having had the misfortune of being accused and imprisoned for the killing of Phillip Lawson, your Petitioner did for his trial, and in order to have it according to the Laws of this Realm, by his Peers, petition the House of Lords thereupon, whereas your Petitioner ought in duty, and according to the legal methods in cases of this nature used and approved, to have made his application to your most sacred Majesty, as the fountain of all the Honour within this Realm, and accordingly the said misadvised petition was dismissed, and your Petitioner further humbly shows that then your Petitioner was indicted for the offence above mentioned by the name of Charles Knowles, and upon his arraignment in the King's Bench your Petitioner did plead his said title and the descent thereof to him in manner aforesaid, and that, therefore, his name was Charles Earl of Banbury, to which your Majesty's Attorney replied, the

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dismission of the said petition by the House of Peers; that thereupon your Petitioner demurred, and after many long arguments, judgment was given by the Right Honourable the Lord Chief Justice Holt and the rest of the Judges there, in favour of your Petitioner's name and title; that your Petitioner stands likewise indicted by the name of Charles Earl of Banbury for the same offence, and that the same remains undetermined for the reasons aforesaid; that by reason of the premises your Petitioner did suffer long imprisonment and great expenses, and is still under the same accusation by the name of a Peer, and as such hath been taxed upon the Poll Act, and during your Petitioner's troubles writs have issued out of your Majesty's Court of Exchequer for the same charge as a Peer, which he hath since satisfied. Now, forasmuch as your Petitioner humbly conceives himself well entitled to the said title and dignity, and that your Petitioner may be the better enabled to show and manifest his zeal for your Majesty's service, as by the duty of his allegiance he is obliged, your Petitioner humbly prays your Majesty's tender consideration of the premises, and that you would be pleased to declare your Royal pleasure in favour of your Petitioner's said right, by granting him a writ of summons to Parliament, or to recommend your Petitioner's case to an examination by the Lords Spiritual and Temporal in Parliament assembled, in order to your Majesty's more certain information of the truth of the premises, or otherwise to do herein as to your Majesty's great wisdom shall seem meet, and your Petitioner shall, as in duty bound, daily pray for your Majesty's, &c.

"Banbury[1]."

It is deserving of attention that the Petitioner attributed the hostility of the Lords towards his father to a

[1] *Printed Evidence*, pp. 90—92.

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dispute which arose between him and the other Peers respecting his Precedency,—a subject extremely likely to create jealousy and animosity; and, as has been already observed, the assertion derives support from the fact that Earl Nicholas's petition to the King in 1661 prayed, besides a writ of summons, that he might "enjoy all the Precedency and privileges" granted by the letters patent creating the dignity. Another cause to which the Petitioner attributed his father's exclusion from the House of Lords was the influence of James Duke of York, afterwards King James the Second, of which it is now impossible to ascertain the truth; but that some undue influence did prevail is indisputable, and, as has been before suggested, if the petitioner was correct in imputing that feeling to the Duke of York, it likewise explains the reason why he did not do more, during the reign of that prince, than present a petition asserting his right to a writ of summons.

On the 18th of January 1698, the King referred the petition to the House of Lords, "to examine the Petitioner's claim and title therein mentioned, and to certify Us how the same shall appear to them, with their opinion thereupon," which was taken into consideration on the 29th of that month, when thirty Peers "were appointed to draw a representation, to be presented to his Majesty, of what proceedings have been formerly in this House, in relation to this matter, and report to this House;" and the Committee was likewise ordered "to consider of the proceedings in the Court of King's Bench since the judgment of this House on the 17th January 1692-3, in relation to this matter, and have power to send for persons, papers and records, and report to this House their opinion thereupon[1]."

On the 1st of February a draught of the representa-

[1] *Printed Evidence* pp. 92, 93.

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tion was prepared, and the Committee ordered "all the records of the proceedings in the King's Bench relating to the trial of Charles Knollys, who styles himself Earl of Banbury," to be brought to them.[1] These were produced on the 3rd of that month, and the officer of the Court was directed to inquire, whether that person had not been indicted by the name of 'Charles Earl of Banbury,' since those proceedings; and he was ordered to attend the next meeting of the Lords' Committee, with the records which he had then read. It was also ordered that the Lord Chief Justice of the King's Bench should attend on the ensuing Saturday, the 5th of February, "in relation to the proceedings that had been before him in the said Court of King's Bench on the trial of the person that styles himself Earl of Banbury[2]."

On the 3rd of February the Earl of Rochester reported from the Committee the representation proposed to be presented to the King, which stated "that about five years since, the same person did petition the House of Lords, that being indicted for the death of Philip Lawson he might be admitted to his trial by his Peers; and if any question should arise thereupon, that he might be heard by his counsel at the bar of the House; upon which the Lords did order the Petitioner to be heard by his counsel at the bar of their House, for the making out his title to the said Earldom, and also your Majesty's then Attorney-general to be heard on your Majesty's behalf; and upon full hearing of both sides, the House came to this resolution and judgment, that the Petitioner had no right to the title of Earl of Banbury, and ordered his petition to be dismissed, which judgment, the Lords have great reason to believe was not made known to your Majesty at the time of making the aforesaid reference[3]."

[1] *Printed Evidence*, p. 93. [2] *Ibid*, pp. 94, 95. [3] *Ibid*.

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Lord Chief Justice Holt attended the Committee on the 5th of February 1698, and after being informed that the Committee had considered all the proceedings in the Court of King's Bench, he was desired "to give their Lordships an account why that Court had so done." He replied to the following effect: "I acknowledge the thing; there was such a plea, and such a replication; I gave my judgment according to my conscience. We are trusted with the Law. We are to be protected, and not arraigned, and are not to give reasons for our judgment; therefore I desire to be excused giving any." His Lordship then withdrew, and soon afterwards being again called in, he was asked "whether he persisted in the answer he had given?" to which he replied, "I gave judgment as it appears on the record. It would be a submitting to an arraignment for having given judgment if I should give any reasons here. I gave my reasons in another place at large. If your Lordships repeat this to the House, I desire to know when you do so, that I may then desire to be heard in point of Law. The judgment is questionable in a proper method, but I am not to be questioned for my judgment. Mr. Justice Eyre (who then sat on the Bench with me, and concurred with me and the other Judges,) is living. I am not any way to be arraigned for what I do judicially. The judgment may be arraigned in a proper method by writ of error. I might answer if I would, but I think it safest for me to keep myself under the protection the Law has given me. I look upon this as an arraignment. I insist upon it, if I am arraigned, I ought not to answer[1]."

The Committee then ordered that Mr. Justice Eyre should attend on Monday the 11th; and the officer of the Court of King's Bench who had before attended being called in, he stated that Mr. Knollys was then under

[1] *Printed Evidence*, pp. 95, 96.

bail; that there were two indictments; that the one by the name of "Charles Knollys" was quashed, and that the other by the name of "Earl of Banbury" was still in being; and being asked "how the indictments were brought into Court?" he said it was by rule of Court[1].

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On Monday the 7th of February Mr. Justice Eyre attended the Committee, and the same statement was made, and questions put to him as had been done to the Chief Justice, and his answer was no less firm and dignified than that of Lord Holt. "I remember," he said, "we adjudged the Earl of Banbury's plea to be good in Law. He was indicted by the name of Charles Knowles, esq.: he pleaded a patent to his grandfather from King Charles the First, and claimed by descent from him. We all held it a good plea, and I was of that opinion. I own it. It was according to my judgment and conscience. The King entrusts me with the administration of justice. I have ever given my opinion upon the greatest consideration and upon my conscience. I humbly beg pardon if I say I ought not by the Law to be called to account for the reasons of my opinion. If we err in judgment, the judgment may be rectified by writ of error, but the Law acquits us. I humbly beg pardon as to the reasons for my opinion. If the matter come before the Lords by writ of error, I shall give my reasons as well as my opinion. Being called by writ '*ad consulendum*,' I humbly beg your pardon for giving no reasons at present[2]."

The Committee determined "to report the matter specially," and the House resolved, that it should be taken into consideration on the following Thursday, the 10th of February[3]. On that day the report of the Committee was read, and it was proposed to hear the Chief Justice on this point: "Whether he did right in refusing to give

[1] *Printed Evidence*, p. 96. [2] *Ibid.* pp. 96, 97. [3] *Ibid.* p. 97.

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account to the Committee, or not, of his reasons for his judgment in the King's Bench in relation to the quashing of the indictment of a person who claimed the title of Earl of Banbury?" and the Chief Justice and Mr. Justice Eyre were ordered forthwith to attend the House. On the arrival of the Chief Justice, the Speaker acquainted him with the report of the Committee; that the House had consequently sent for him and Mr. Justice Eyre, and expected that he would give the House "an account why he refused to give the Committee the account which he refused to do, and that he desiring to be heard when the report was made, they had now sent for him to state his reasons why he did not think fit to give the Committee the reasons for his judgment." After reading the order of reference to the Committee and its report, the Lord Chief Justice addressed the House to the following effect: "I never heard of any such thing demanded of any Judge as to give reasons for his judgment. I did think myself not obliged by Law to give that answer. What a Judge does in open Court he can never be arraigned for it as a Judge. A Privy Councillor and a juryman are obliged to keep secret [1]."

Mr. Justice Eyre was then heard, who merely stated that he had no reason to find fault with the report, and referred to what the Chief Justice had said [2]. It was moved that the two Judges should withdraw, which was negatived; and, after debate, the Lord Chief Justice again addressed the House, and it was agreed that the questions asked him by the Committee "were not intended as to accuse;" to which he answered, that "he had other reasons to induce him not to do it." The discussion was then adjourned to Monday the 11th of February; when Lord Chief Justice and Mr. Justice Eyre were ordered to attend the House, and also one Judge of each of the Courts in Westminster Hall [3].

[1] *Printed Evidence*, pp. 99, 100. [2] *Ibid.* p. 100. [3] *Ibid.*

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Here all notice of proceedings respecting the Banbury claim ceases on the Journals of the House of Lords[1]; and the House appears to have abandoned its fruitless and undignified struggle with the Court of Common Law. The foregoing account of the speeches of the Judges is taken from the imperfect notes in the Minute-books or Journals of the House of Lords; and it is much to be regretted that a fuller report of their addresses on points of such high constitutional importance are not preserved, for it is highly probable that the legal learning for which they were distinguished was eminently displayed on an occasion that involved not only their reputations, but even their offices, and personal liberty. From what occurs on the Journals, the debate would seem to have been cold and formal; but it is stated by high authority[2], that the discussion was conducted with great heat, and that it was even proposed by some Lords to send the Judges to the Tower for presuming to dispute the jurisdiction of the House of Lords. Never was the majesty of the law more successfully vindicated, or the character and independence of English Judges more firmly maintained; and if the claim to the Earldom of Banbury were utterly insignificant in itself, the occasion which it afforded for this memorable precedent of resistance to an unconstitutional assumption of power by the House of Lords, would confer lasting celebrity upon it.

The House was decidedly defeated in the attempt to support the resolution which it had formed against the claim in January 1693; and the opinion pronounced upon it by the Court of King's Bench, received new strength from the angry, though impotent, efforts to impeach that judgment, and to intimidate the learned persons by whom

[1] *Printed Evidence*, p. 101.

[2] Lord Chief Justice Raymond, in a note to his Report of Lord Holt's judgment.

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it was delivered. However great may be the feelings of respect for the House of Lords, it is difficult to contemplate its proceedings on the claim to the Earldom of Banbury from **1661** to **1693**, without being deeply impressed with their injustice. The desire to accomplish a particular object, by extra-judicial measures, is constantly apparent; and an attentive consideration of its conduct must lead to the conviction, that the House is not the tribunal before which a claimant of a Peerage was, at that time at least, *certain* of receiving the same speedy and impartial justice which he would obtain in one of the Courts below; that passion, self-interest, and violent prejudices have on some occasions interrupted the due administration of the Law; and that the vice which is incidental to all irresponsible tribunals, is not unknown to that assembly, namely, that it has sometimes *made* the Law, instead of *administered* it. Can a more lamentable circumstance be imagined, than a collision between the highest Legal tribunal in the realm, composed principally of *laymen*, and from which there is no appeal, and the highest Court of Common Law, upon a point of *Law*, and involving an important right of inheritance? That such was, unfortunately, the fact in the case under discussion cannot be denied; and after the lapse of upwards of a century the *same case* was again, *ex necessitate rei*, submitted to the decision of the *same tribunal*, without one of the defects in its constitution or practice having been remedied; and with the accumulation of all those prejudices which time never fails to create against a cause into which they have once entered. In that long period *the Law itself had undergone a change* most *injurious* to *the legal rights on which the claim was originally grounded*; and it was useless to contend, that *the justice of the case required that it should be adjudicated according to the law as it stood when the right accrued, namely, when Nicholas Knollys was born.*

Charles Earl of Banbury renewed his claim in the year 1712, by presenting a petition to Queen Anne, dated on the 19th of March in that year, in which he stated the facts of his case, namely, the particulars of his father's claim to the dignity, and his own claim in 1685, the proceedings in the King's Bench and in the House of Lords in 1692 and 1693; his petition for a writ of summons in 1697, with the measures taken by the House thereupon. He said that having been indicted for the murder of Mr. Lawson by the name of 'Charles Knollys, Esq.' he had pleaded his Peerage, "and the same was allowed by the Court of Queen's Bench, and judgment given by all the Judges for him, but was obliged to give bail as Earl of Banbury, and remains yet under the same." He complained that the representation made by the House of Lords in their address to the Crown in 1698 did not set forth that part of the proceedings entered in the Journals which were in his favour, nor the judgment given for him by the Judges; and he concluded by praying, that if her Majesty was not advised to send him a writ of summons, that she would be pleased to give such directions to the Attorney-general as that the matter might be brought judicially before the House of Peers, for his relief in the premises.

Case of the Earldom of Banbury, 1712.

It was ordered by the Queen in Council, on the 3rd of April following[1], that it be "referred to a Committee of the Council, to examine the matter of the said petition, and having heard the petition thereupon, to report the state of his case to her Majesty as the same shall be made to their Lordships." The Privy Council accordingly met, and directed the Attorney-general, Sir Edward Northey, to inspect the whole proceedings and to make his report, which he drew up, "but for want of the President of the Council, reviving the Committee, he could

[1] Appendix to the *Printed Evidence*, pp. 3–5.

Case of the Earldom of Banbury, 1727.

not make his report to them thereon, and the sudden demise of her late Majesty prevented any further proceedings[1]."

Soon after the accession of King George the Second Charles Earl of Banbury presented a petition, congratulating his Majesty upon that event, and stating that "he had never met a favourable occasion to set his case in a true light until his Majesty's auspicious reign, from whose springs of justice and clemency he cannot fail of relief and redress." He therefore prayed the King "to direct the Attorney-general to give his Majesty a full state of the proceedings of Parliament relating to his right of Peerage, as also what proceedings were had in the inferior Courts of Judicature in Westminster Hall, and lay the same before his Majesty in Council, that his Majesty might be truly apprized of the justice of his case, and that he might be relieved accordingly[2]."

This petition was referred to the Attorney-general in November 1727[3], and Sir Philip Yorke, who then filled that office, made his report in January following, in which he stated that the Petitioner's agents had laid before him the proceedings on the subject in the years 1660, 1661, 1669, 1670, 1685, 1692, 1693, 1694, 1697, 1698, and 1712; and observed, that "it thereby appears to have been in controversy ever since the year 1660; from which time to this day there hath been no enjoyment of the Peerage claimed by the Petitioner, by sitting in the House of Lords;" that if it was his Majesty's pleasure that "any further proceedings should be had in relation to the said claim, the regular step for that purpose is by referring the petition to the House of Peers, that their Lordships may consider the Petitioner's claim and title, and certify to your Majesty their opinion thereupon which method your Majesty may lawfully take."

[1] Appendix to the *Printed Evidence*, p. 9. [2] *Ibid.* p. 6. [3] *Ibid.* p. 9.

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The report concluded in these words: "But your Majesty hath been pleased to observe, that there appears to have been a difference of opinion between the House of Peers and the Court of King's Bench touching the effect of their Lordships' vote of the 17th January 1692, [1693] whereby it was resolved that the Petitioner had not any right to the title of Earl of Banbury, the Judges of the Court of King's Bench having adjudged that the same was extra-judicial, and did not conclude and bar the Petitioner of his claim to the said title, and the House of Peers appearing to have been of a contrary opinion in their representation to his late Majesty King William the Third, wherein they expressly called that resolution a judgment of their House, and on that account declined entering into the merits of the reference made to them by his said late Majesty: and whether, under these circumstances, your Majesty will think fit now to make a new reference to the House of Lords is a consideration not of Law, but of prudence, which must be left to your Majesty's royal determination [1]."

The petition was not referred by the Crown to the House of Lords, and the matter continued in the same state for about eighty years, *without any relinquishment* of the right on the part of the heirs of the original claimant. Charles Earl of Banbury, who had thus *five several times asserted his right to a writ of summons to Parliament*, by petitions to the Crown, and who had *never ceased to bear the title of the Earldom*, died in France in August 1740. From that period until 1806, when the claim was renewed, the history of the case may be very briefly stated, as it consists only of genealogical facts, and of proofs that the heirs of that individual were uniformly styled in all legal instruments executed by themselves, as well as by other persons; in all Courts in West-

1740.

[1] Appendix to *Printed Evidence*, pp. 10—16.

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minster Hall; and in Commissions from the Crown, "*Earls of Banbury,*" that their wives were styled "*Countesses of Banbury,*" that their children bore those titles which would be attributed by courtesy to the sons or daughters of the Earls of Banbury, and that they were so baptized, married, and buried, *thus affording evidence of uninterrupted usage of the title for upwards of one hundred and eighty years,* which usage was never objected to by the Crown, and the right to the dignities thus assumed and borne, were not questioned, much less denied by any Act of the House of Lords, *for more than one hundred years.*

In noticing the descent of the claimant in 1806 from Charles, third Earl of Banbury, the several persons will be mentioned by the titles which they always bore, and by which they were known in their lifetime. Charles, third Earl of Banbury, was twice married, and died in France in August 1740. By his first wife, Elizabeth Lister, he had a son, William Viscount Wallingford, who died before his father, in June 1740, without issue. By his second wife, Mary, daughter of Thomas Woods, of London, merchant, the Earl had a son, Charles, who succeeded his father as fourth Earl of Banbury, and died in 1771, leaving William Viscount Wallingford his son and heir, who was born in 1726, succeeded as fifth Earl of Banbury, and died unmarried in August 1776, when his brother, Thomas Woods Knollys, became the sixth Earl; and on his death, in March 1793, the title devolved upon his eldest son, William Knollys, then called Viscount Wallingford, who assumed the title of Earl of Banbury [1].

1806.

In 1806, the said William Knollys, by the style of "William Earl of Banbury," presented a petition to the Crown, in which he stated, that "he would not presume to address your Majesty by the title of Earl of Banbury,

[1] The evidence of the descent will be found in the printed *Minutes of Evidence.*

were he not advised and firmly persuaded, that he hath a just and legal claim to the said dignity, and that he may not lawfully use any other designation. For that an inheritable dignity once created cannot be alienated or surrendered, or lost by the negligence of any person entitled to it; neither can it be taken away nor extinguished otherwise than by forfeiture, or by Act of Parliament, or by the natural extinction of all those persons to whom it ought to descend, according to the tenor or construction of the letters patent or writ of summons by which it was originally created. And, the said dignity having been originally granted by letters patent, bearing date 18th day of August, in the second year of the reign of King Charles the First, to the petitioner's lineal ancestor, and the heirs male of his body lawfully begotten, and the Petitioner being, as he is ready to prove, the lineal descendant and heir male of the body of his said ancestors, the said dignity has consequently devolved upon him, and he cannot, as he is advised, divest himself of it.

" But as the Petitioner and his ancestors, for several generations, have not been permitted to exercise or enjoy the most important and essential of all the rights and privileges belonging to the said dignity, particularly their seat and voice in Parliament in common with other Peers of the realm, the Petitioner conceiving that no lawful cause exists, or ever did exist, to justify such exclusion, thinks it a duty which he owes to himself and to his posterity, to use his utmost endeavours to obtain a thorough investigation of all the circumstances of his case; and with that view, and no other, most humbly craves permission to lay it at your Majesty's feet, in full assurance, that if it should appear, as he trusts it will, that he is legally entitled to the said dignity, the impediments which have hitherto prevailed will no longer be

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suffered to operate, but that he shall be admitted to the full enjoyment of all the rights, privileges, and pre-eminences, granted by the aforesaid letters patent."

The petition then recited all the principal facts of the case, and the proceedings in the House of Lords and King's Bench, and the Petitioner's descent as heir of Nicholas Earl of Banbury. Reasons were stated to prove that the resolutions of the House in 1693 were not conclusive; and the Petitioner added, that as he conceived he had made out "such a statement as is sufficient to show, that he is the true and lawful heir of the said dignity of Earl of Banbury so granted to his ancestor by your Majesty's royal predecessor King Charles the First; and that he cannot legally divest himself thereof, or write or call himself by any other name or title, respectfully implores that justice and protection, to which none of your Majesty's subjects ever appealed in vain; and humbly prays, that your Majesty will be graciously pleased to grant him a writ of summons to your Parliament as Earl of Banbury, or to take such other steps as to your Majesty's great wisdom shall seem meet, for the purpose of producing a full investigation and final determination of his case."

1808.

The claimant's petition was referred to the Attorney-general; and Sir Vicary Gibbs, who had succeeded to that office, after hearing Counsel, made his report on the 17th of January 1808, in which, after noticing the judgment of Lord Chief Justice Holt and the Court of King's Bench, by which the indictment of Charles Earl of Banbury for a misnomer in describing him as "Charles Knollys, esquire," was quashed, the Attorney-general said,

"It appears to me that two questions occur in this case:

"First, Whether the resolution of the House of Lords, upon the petition presented to them in 1692 by Charles,

then claiming to be Earl of Banbury, and through whom the petitioner now makes title to his dignity, was a conclusive judgment against the right of the said Charles, because if it was, the petitioner is also concluded by it; if it was not,

" Secondly, Whether the petitioner has made out his right to this dignity by the evidence which he has produced before me.

" In regard to the first, I find in the proceedings upon the indictment against the said Charles, by the name of ' Charles Knollys,' for the murder of Mr. Lawson, the Attorney-general by his replication to the defendant's plea of misnomer, in which he had made title to the Earldom of Banbury, relied upon this resolution of the Lords as a conclusive bar to his right.

" I find also, that the Court of King's Bench, after several arguments and much consideration of the case, under circumstances which must have called their particular attention to it, held, that the resolution was not a conclusive bar, and accordingly gave judgment; that the indictment found against him by the name of Charles Knollys, esquire, should be quashed. If this judgment, which seems to have occasioned much dissatisfaction to many of the Peers, was erroneous, it might have been removed by a writ of error to the House of Lords, and there reversed ; but no steps were taken for reversing it, and therefore, I feel myself bound by so high an authority, humbly to report my opinion to your Majesty, that the resolution of the House of Lords in 1692 [1693] was not a conclusive judgment against the right of the said Charles.

" Upon the second question, it appears to me that the grant of this dignity to William, the first named Earl, his sitting in the House of Lords as Earl of Banbury, his marriage with the Lady Elizabeth ; the birth

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of Nicholas, who is stated to be his second son, during that marriage, and the several branches of the descent from Nicholas to the petitioner, are satisfactorily proved, but that the legitimacy of Nicholas is left in a considerable degree of doubt.

" With this impression upon my mind, following the usual practice of my predecessors in office, where the case before them has been attended with doubt or difficulty, I humbly advise your Majesty to refer the annexed petition of William, calling himself Earl of Banbury, to the House of Lords."

The King referred the petition to the House of Lords, and the claim continued before the Committee for Privileges from the year 1808 to the year 1813.

The immediate cause of the claimant's resolving to bring the question before the House of Lords is thus stated in the case printed on that occasion, whence it appears that the Crown had been advised to deviate from its former usage of styling him " Earl of Banbury" in the commissions which he bore in his Majesty's army :

" His father, the late Earl, had the honour of being an officer in his Majesty's third regiment of foot, previously to his succeeding to the Earldom; and the now petitioner was brought up in the army, and has now the honour of being a Major-general in his Majesty's service. Whilst the petitioner's father was living, the petitioner, under the established courtesy as to sons and heirs apparent of Earls, was styled ' William Knollys, *commonly called* Viscount Wallingford.' But on his father's death, and the consequential descent of the Earldom of Banbury to the now petitioner, the style of a Viscount by courtesy became inapplicable to him ; and with the Earldom so descended upon him, his having recently taken a commission from his Majesty under the description of ' William Knollys, claiming the title of Earl of Banbury,' though even so commission-

ating the petitioner somewhat approaches to the Crown's considering the petitioner as entitled to the Earldom, might be prejudicial to himself and family, unless, by subsequent conduct of a decisive kind he should evince, that in accepting promotion from the Crown under such a qualified description of him with reference to his Earldom, he only acted in submission to the urgency of his military situation, and to the pleasure of his most gracious Sovereign, who tempers his never-ceasing solicitude for justice with that caution, which aims to prevent his being supposed to administer it, when the occasion calls for the exercise of another kind function under such circumstances, as, without such caution, might be construed an unsolemn mode of overruling proceedings of the House of Lords in former times. Being so situate, and at the same time indulging the hope of an entire cessation of the spirit of violence which, as he feels, heretofore denied to his ancestors an administration of the law of the country, notwithstanding the loud call of a solemn and unanimous judgment of the first Law Court of Westminster Hall, and a conduct on the part of King William and his first law advisers and officers, both of which implied, that the case required a different treatment."

On the 30th of May 1808[1], the Committee for Privileges to which the petition was referred by the House of Lords, met, when Sir Samuel Romilly, Mr. Hargrave, and Mr. (now Justice) Gazelee, appeared as counsel for the Petitioner; and the Attorney-general, Sir Vicary Gibbs, and Mr. Tripps attended on behalf of the Crown. The evidence produced in support of the claim con-

[1] The Committees for Privileges heard proceedings on the claim to the Earldom of Banbury on the following days; viz. 30th May, and 9th and 16th June 1808; 21st, 23rd and 28th February, 30th May, 1st and 8th June 1809; 27th and 29th March, 3rd and 10th April, 10th May, 5th, 14th, 16th June 1810; 19th, 21st, 25th, 26th, 29th March, 2nd, 8th, 30th April, 2nd, 13th, 30th May, 6th June, and 4th July 1811.

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sisted of the letters patent creating the Earldom of Banbury, the Lords' Journals, Inquisitiones post mortem, deeds, proofs of pedigree, and the other documents, all of which have been alluded to. To this evidence it is proper to add the following abstract of the will of Lord Vaux, which was dated on the 25th of April 1661, and was proved on the 9th of September following, because it tends to negative the idea that he was the real father of Nicholas Earl of Banbury, inasmuch as he merely gave him and his wife a small sum of money for mourning, and describes him in no other way than by his title, whilst he gave all the little plate he possessed to his brother and sister, and bequeathed the residue of his small property to strangers:

Lord Vaux ordered his body to be buried in the church of Dorking, in Surrey, and directed that no one, except the family of a Mr. Augustine Belson, of that place, and his own servants, should be invited to attend his funeral. He gave his brother, Mr. Henry Vaux, 10*l.* for mourning, and his silver tankard. To his sister, Mrs. Joyce Vaux, 10*l.* for mourning, together with his silver pottinger and spoon, which, he said, was "all the plate he had left." To "the Earl of Banbury and his lady 10*l.* a piece to buy them mourning." To the wife of the aforesaid Mr. Belson he gave the bed he then lay on; and to his "valentine," Mrs. Katherine Belson, the little gold cross which he wore about his neck. To Mr. Charles Jennings 40*l.*, a mourning suit, and a certain green velvet box with its contents, with other trifling legacies. To his servants he bequeathed various sums, from 5*l.* to 50*l.* each, among whom was Edward Wilkinson, to whom he left 10*l.* to buy him and his wife mourning; and left all the remainder of his property to the aforesaid Augustine Belson, Esq., whom he appointed his executor.

On the part of the Crown, evidence was given to show that Rotherfield Greys was entailed upon the heirs male

of the Earl, that the entail could not be barred, and that it was not inherited by the claimant's ancestor, but had been alienated to Sir Robert Knollys, and was by him sold to Mr. Evelyn[1]; the funeral certificate of the death of the Earl; his will; the parish register of Rotherfield Greys, to show that no entry occurred therein of the birth of Edward or Nicholas Knollys, or of any other child of William Earl of Banbury; the settlement of Lord Vaux's lands upon Nicholas Knollys, &c.; but as abstracts of all those documents will be found in the preceding pages, it is unnecessary to refer more particularly to them.

Whilst alluding to the evidence produced on that occasion, it is proper to add, that besides the discussions which took place respecting the Depositions made in Chancery in 1641, arguments arose on tendering the monthly Waiting-book of the College of Arms, which contained an account of the division of fees among the heralds, as evidence of the facts which produced those divisions of fees, and the House allowed it to be received[2]. A book, containing Funeral Certificates of the Nobility, in which was the certificate of the burial of William Earl of Banbury, was tendered on the part of the Crown, but that certificate was refused[3], because it was not signed by the Officer of Arms who attended the ceremony, or by any other person[4]. A letter missive from Lord Chan-

[1] A circumstance occurred respecting those instruments, which is here noticed, lest it be said that any fact of the case has been suppressed. It was alleged in the case which was delivered to the House of Lords, on the part of the Crown, that in the Indenture of the 4th March, 6 Car. I. 1631, between the Earl of Banbury and Elizabeth his wife, of the one part, and Sir Robert Knollys on the other, respecting the alienation of the manor of Rotherfield Greys (*Vide* p. 302, antea), the said Sir Robert was described "as cousin and next heir male" of the said Earl; but it appeared that this statement had been taken from a schedule of the deeds relating to that property, and that "the original deed did not contain the important fact above mentioned."—*Printed Evidence*, pp. 136, 137.

[2] *Printed Evidence*, p. 241.

[3] This book seems to have been read in evidence in 1693.—*Le Marchant*, p. 415. *Vide* p. 403, antea.

[4] *Ibid.* p. 247.

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cellor Nottingham to the Earl of Banbury, upon occasion of a cause in the Court of Chancery in the year 1674, which the Petitioner's counsel said was instituted by Lord Banbury's brother-in-law, was offered as legal evidence of reputation, and to the extent of an official admission of that reputation by an act of the Lord Chancellor; but he was informed that previous to any opinion being given, whether the matter was or was not admissible in evidence, it was necessary that a statement of it should be laid before the House in print, according to the usages and orders of the House, and therefore that it was for him to exercise his discretion in that respect; whereupon the Petitioner's counsel waived the same[1]. The House permitted the original Minute Books of the Committees for Privileges, and other original proceedings before those Committees, to be received in evidence. The claimant's pedigree, as heir male of the body of Nicholas Earl of Banbury, was admitted to have been satisfactorily proved.

The following report of the speeches of the Petitioner's counsel, of the Attorney-general, and of Lords Eldon, Ellenborough and Redesdale, were collected and printed by Mr. Le Marchant, whose notes are retained. As, however, many of the statements in those speeches are susceptible of a very different construction from what was given to them by their authors, whilst part of the allegations can be completely refuted, some observations will be submitted in answer to the most material objections which are there urged against the claim.

Sir Samuel Romilly:—"The illegitimacy of the ancestor of the claimant is sought to be established on the presumption of his being the son of Lord Vaux. It is admitted that he was the son of Lady Banbury, that he was born during wedlock, and that no evidence can be proved to have transpired during the life of Lord Banbury, to charge Lady Banbury with an adulterous inter-

[1] *Printed Evidence*, p. 247.

course with Lord Vaux, or any other individual. There is no evidence of divorce, or even of separation, between Lord and Lady Banbury; whilst there is ample evidence of their having lived upon the most affectionate terms, up to the time when their union was dissolved by his Lordship's decease. If upon the day before that event, Lady Banbury had been tried for adultery with Lord Vaux, can it be said that she would have been found guilty? If her guilt could not then be established, it must be by some newly discovered rule of law that she should now be judged by acts which had not been committed at the date of the imputed offence, and that every material part of her conduct through life should be referred to an imaginary motive, identifying it with a fact, which cannot be proved to have ever taken place. The fact indeed is highly improbable. Lord Vaux was the friend of Lord Banbury, and the only relation in which he appears to have stood towards Lady Banbury during her husband's life, was that of trustee in the settlement of the Caversham property in favour of Lady Banbury; and it should be observed, his Lordship held that office jointly with Lord Holland[1], a most distinguished nobleman, and one who was very unlikely to be involved in so dishonourable a transaction, as this would be if the charge against Lady Banbury is well founded.

"The evidence that William Earl of Banbury was not the father of Nicholas, may be reduced to these points:—

1. That he was of an advanced age.
2. That he was childless in 1628.
3. That he never knew that he had such a son.
4. That there is no evidence of the baptism of Nicholas; and that he was treated as the child of Lord Vaux.

[1] "The Lord Holland whose name has been immortalized by Clarendon."—*Le Marchant.*

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5. That the Inquisitio post mortem finds him to have died without issue.

6. That Rotherfield Greys did not descend to Nicholas.

" The objection to the age of Lord Banbury may at once be dismissed. The law of England admits of no age at which a man may not become a father, and many medical authorities may be cited to show that this rule is founded on reason. Dr. Gregory, of Edinburgh, whose name must be familiar to all admirers of science, says, upon this subject, " Magna autem de his rebus differentia, decantantur enim exempla senum in castris Veneris strenue merentium, postquam centum annos compleverant; neque sane dubium, aut adeo rarum octogenarium patrem fieri[1]." Haller likewise pronounces a man of ninety to be capable of procreating[2]. Parr became a father in his 140th year. In short, the liberality of the law on this subject is excessive, for there is no age from seven upwards[3], at which a man is denied the privilege of having children.

" The proceedings before the House related only to a point of precedence. It was stated by the King that the Earl was old and childless; and this was the fact, at the date of the patents of the noblemen over whom the precedency was conferred; at the date of Lord Banbury's own patent; and most probably at the date of Lord Banbury's representation to the King to that effect[4]. Edward's birth took place a year after the date of the patent, and only a few weeks before the King's message. Lord Banbury might have considered himself aggrieved at being excluded from the creation in February 1626. He might have resolved to keep his

[1] " Conspectus Medicinæ Theoreticæ, vol. II. p 7."—*Le Marchant.*

[2] " Elementa Physiologiæ Corporis Humani, 4to. vol. VII. p. 375."—*Ibid.*

[3] The cases in the Year Books show that the Common Law did not admit the possibility of a boy being a father under the age of *fourteen*. *Vide* p. 52, antea.

[4] See the remarks on this subject, p. 342 *et seq.*, antea.

precedency upon any terms. He might have entertained some scruples at resigning an honour which the House had treated as so important. He might have felt a morbid delicacy at avowing before his youthful peers this unexpected addition to his family. He might have suffered a statement to be made by the King which he would not have made himself. He might have been a weak, or even an unprincipled man. But be this as it may, the fact cannot prejudice Nicholas our ancestor; he unquestionably was not born until the following year[1]: and it would be bold to infer, that if one child of a marriage cannot be proved to be legitimate, all the subsequently born children must consequently be illegitimate. This would indeed militate against the old and approved maxim of 'pater est quem nuptiæ demonstrant.' If all these presumptions are rejected, and Nicholas is involved in the suspicion which attaches to his brother, I would remind the House, that the clearest demonstration, that the child was concealed, and that it had been kept in total secrecy by its mother, would only lead to an inference, which, after all, is of less weight than an express declaration of its illegitimacy by the mother. The law has wisely ordained this species of evidence to be inadmissible. A mother is an incompetent witness to prove her child's illegitimacy. Upon that point her mouth is closed; and God forbid that it should be otherwise. A vicious woman is too likely to make an unnatural mother[2], and as the nature of her guilt must necessarily cause her own testimony to be conclusive, she would retain a power over her children which her hatred for her husband might induce her to exercise to their destruction, without any regard to truth. It would be superfluous to cite the

[1] Nicholas was not born until *two* years afterwards. *Vide* p. 306, antea.

[2] "Neque fœmina amissa pudicitia alia abnuerit. Tacit. Ann. l. iv. c. 3. in relating the intrigues of Sejanus with Livia, the wife of Drusus."—*Le Marchant.*

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numerous authorities in support of this proposition[1], but I cannot help adverting to a case in France, which may be found in the pleadings of the celebrated D'Aguesseau, where this doctrine was completely established after much discussion[2]. The facts were as follow:—The husband held an office about the Court, which required his frequent absence from home. His wife after many years of marriage proved unfaithful to him. She became pregnant, as she believed by her paramour. She was clandestinely delivered, the child was reared and educated by its real father, and it was baptized as an illegitimate child. The pregnancy of the mother, the birth, nay, even the existence of the child was long unknown to her husband. He at length discovered the guilt of his wife, and its consequences. He resorted to legal proceedings. His wife made an ample confession, which included the most explicit declarations of the illegitimacy of her child. A divorce was granted, but the guardians of the child refused to release the husband from the obligations imposed upon him by his marriage contract. They sued him before the parliament of Paris, and that learned body established the legitimacy of the child. There are similar cases in the French books. One of an earlier date (that of Madame de Cognac) has been cited in this House by Lord Nottingham with marked approbation. These decisions do not rest on local usage or technical rules; they are founded on the Civil law, which is the source of all the authorities that will be cited on this occasion. They draw a just deduction from the principles laid down in those authorities, and one that we may safely follow, though delivered by a foreign tribunal. Reason is reason everywhere. But these principles are not new in this House, for Lord Nottingham, in the claim of the

[1] "The cases are collected in Starkie on Evidence, P. iv. 123."—*Le Marchant.*

[2] "'Plaidoyer pour le Sieur de Vinantes.'—Œuvrages D'Aguesseau, one of the most beautiful specimens of judicial eloquence that has ever been given to the world."—*Ibid.*

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Viscounty of Purbeck[1], one of the most important cases ever agitated here, and argued by the most eminent lawyers, expressly pronounced the declaration of the father or mother to the prejudice of a child's legitimacy was not to be endured, inasmuch as 'filiatio non potest probari.' His Lordship cites the case of Madame de Cognac, where the child having established her legitimacy in the mode prescribed by the law, her disavowal by her mother was not allowed to have any weight. Lord Ellenborough has repeatedly maintained the same doctrine in the Court of King's Bench[2].

"It has been urged that because Nicholas is called Nicholas Vaux in the deed of 1646, that he must have gone by that name from his birth up to the execution of the deed. This is a very strained inference[3]. We must recollect that during part of his infancy, the troubles of the day rendered it more safe for him to go under any appellation, rather than that of Earl of Banbury, and there is nothing extraordinary in his assuming the name borne by his step-father and benefactor. Is there the slightest evidence in any of the proceedings, that he was called Vaux during the life of Lord Banbury, or until he came to live with his adopted father? There are numerous instances of such adoptions, and even of changes of name resulting from them, but this is the first that has been ascribed to such an unworthy motive. Before I quit the deed of 1646, I wish to state that Nicholas was no party to it, and the most unfavourable construction of it ought not to prejudice him, it being open to the objections that apply to the declarations on the part of Lady Banbury.

"The legitimacy of Nicholas can be the result of presumption, only in case of the absence of proof. Like every other fact, it must be established by evidence,

[1] *Vide* the account of the *Purbeck* case, pp. 99 *et seq.*, antea.

[2] *Vide* pp. 128, 131, 136, 154, 165, 168, antea.

[3] *Vide* the remarks in p. 368, *et. seq.*, antea.

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either direct or circumstantial. The former, if sufficient to satisfy the judge, is conclusive, although it may be irreconcileable with the latter. We must not overlook the dangers of trusting too implicitly on circumstantial evidence. If the connexion between cause and effect in the material world has so long baffled every philosophical inquirer, surely we ought to approach with diffidence a similar investigation in the moral world. Who can pretend to ascribe to each act of man its real motive, and to hit with an unerring aim the hidden and indefinable source of human impulse? Let us not be roving after shadows of truth. Let us collect it, not by fanciful and imaginative deductions, but by the safer and surer method of examining the testimony of the witnesses who were called to the bar of the House in 1661. One of these persons (Anne Delavall) had seen Lord and Lady Banbury in bed together. Another (Mary Ogden) was present at the birth of Nicholas. It was deposed [1] that Lord Banbury had seen the child and owned it, and what perhaps was supererogatory, that his Lordship hunted and hawked until half a year before his death. These facts constitute *the legal demonstration* of Nicholas's legitimacy, and it was unnecessary for the claimant to do more. His case was *primâ facie* proved. It was for those who opposed it to controvert his facts, by impeaching the veracity of the witnesses. It does not appear from the Journals that they did so. They did not attempt to prove the impotency of Lord Banbury, or his separation from his wife. They asked a few questions respecting his recognition of the child; these were answered it is presumed satisfactorily, for they called no witnesses, though they had the power of doing so, and many Peers were then in the House who were capable of affording every information. If the reputation had existed that Nicholas

[1] Anne Delavall stated that he had "owned" the child, but she did not say that he had "seen" it. *Vide* p. 330, antea.

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was not the son of Lord Banbury, the legal officers of the Crown were bound to have brought it before the House in a proper shape. They ought to have proved such reputation. Nicholas could not be expected to prove a negative, and it is doubly cruel to impose this necessity on his descendants.

" To revert to the evidence of suspicion. We are asked for the register of Nicholas's baptism. I reply that registers of baptism of so early a date were then kept with extreme irregularity, and that the registry at Harrowden has not been preserved up to that time[1].

" If any of the Peers had known any facts prejudicial to Nicholas, they would probably have declared them. It was their duty to have given their knowledge as witnesses, and not as judges. Nothing could be more criminal than to allow their private prepossessions to influence their judgments. They were not justified in depriving him of the state and condition to which he was born by any other than legal means, and it was illegal to see or to hear any thing relative to the case out of the Court in which it was tried.

" The resolution of the Peers was, that Nicholas was legitimate in the eye of the law[2]. I am yet to learn what other legitimacy there can be, than legal legitimacy. Why should the expression excite surprise?

" The Inquisitions were ex parte proceedings. They

[1] " This was proved in evidence."—*Le Marchant*, p. 425. Moreover, Lady Banbury was a Roman Catholic.

[2] The Committee for Privileges *first* resolved " to Report the matter of fact that, *according to the law of the land, he is legitimate*;" but the report *made to the House* was, that " it was the opinion of the Committee that Nicholas Earl of Banbury *is a legitimate person*." On the *second* occasion the Committee reported that " Nicholas Earl of Banbury being, in the eye of the law, son to William, late Earl of Banbury, the House should advise the King to send him a writ to come to Parliament;" and the Committee, pursuant to the order of reference, then proceeded to state what should be his *precedency* in the House."—*Vide*, pp. 311, 312. 384—389.

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Sir Samuel Romilly.

might be quashed or defeated in more ways than I can profess to state, not having devoted my life to such inquiries[1].

"It seems to me very questionable whether a legitimate son of Lord Banbury could have recovered Rotherfield Greys from the heirs of Sir Robert Knollys. I contend that the estate might be alienated notwithstanding the tenure. It is clear that if the King granted an estate, and did not specify in the grant that it was for services rendered, the issue might have been barred. The grant must be by way of reward. In this case no such consideration is expressed. The question depends on the construction of the statute, and is not without difficulty[2].

"The parliamentary proceedings subsequent to the year 1661 are so far important, as they disprove any acquiescence on the part of the ancestors of the claimant in the non-recognition of their title. The claim has never slept. It has been kept alive by repeated applications to the House, the effect of which has been to leave the right as it originally stood at the death of William Earl of Banbury. The report of Lord Hardwicke was merely to prevent a repetition of the disagreeable contest that had taken place between two superior Courts. It referred wholly to the dispute between the Judges and the Lords. At that time it would have been most impolitic to agitate such a question."

Sir Samuel Romilly concluded by a most pathetic appeal to the feelings of the House[3].

[1] See some observations on the Inquisitiones post mortem, p. 359, *et seq.* antea.

[2] Reasons have been stated to show, that whether, in fact, a son of Lord Banbury could have recovered Rotherfield Greys (notwithstanding the alienation to Sir Robert Knollys) or not, it was *then supposed* that the manor *could be alienated*, which destroys the inference attempted to be drawn from the nonclaim to that property by Nicholas Earl of Banbury. *Vide* p. 375, *et seq.* antea.

[3] *Le Marchant*, p. 416-426.

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Attorney-General, 16th June 1810.

The Attorney-General[1] (Sir Vicary Gibbs):— "The proposition upon which Sir Samuel Romilly seemed most to rely, was, that I had undertaken to prove that Nicholas was the son of Lord Vaux, and that I had failed in establishing that fact. The House must not be thus misled. My argument rested on a broader base; I drew my deduction from a series of circumstances in the conduct of Lord Banbury, Lady Banbury, Lord Vaux, and Nicholas Vaux[2], wholly irreconcileable with the claim being well founded. Your Lordships must recollect the position in which I stand. I come here in a semi-judicial capacity, without any other object than to secure the triumph of truth. My duty calls upon me to point out the defects of the claimant's case, and to continue my opposition as long as those defects exist. No proposition originates with me. The question is not, whether any of the circumstances I have stated are adequate to prove the illegitimacy of Nicholas, but whether, on the whole, the claimant can make out the legitimacy of his ancestor. If I deny that he was legitimate, it is not incumbent on me to show negatively, that he was not the son of Lord Banbury, but the onus is on the claimant, to show that he was, and also to show that the claim has not been extinguished, either by the former proceedings in this House, or by the length of time during which it has lain dormant[3].

[1] Mr. Le Marchant observes, "I have searched Sir Vicary Gibbs's papers in vain for his notes of this arrangement," p. 427.

[2] It does not appear what part of *Nicholas*'s conduct was considered injurious to his right. He was not bound by the description of him in the deed of 1646, because he was then a minor; and he bore the name of "Vaux" at too early a period of life for him to repudiate it, or to perform any other act whatever in defence of his legal status. From the death of his brother Edward, in 1646, until his own death, he bore the title of the Earldom, and did every thing which was possible to establish his claim to the dignity.

[3] As Nicholas, the claimant's ancestor, was born in wedlock, he was *prima facie* legitimate; as his legitimacy, so far from being disproved, was twice admitted by the Committee for Privileges in his own lifetime; and as

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"Age may not be proof of impotency, but it is evidence of it. The probability of the Earl's begetting a child at eighty is very slight, and it is not increased by the appearance of another child two years later. Instances have been adduced of these extraordinary births, but none have been cited, in which a man at eighty-two having begotten a son, had concealed the birth of such son[1]. Would not he seek publication rather than concealment? Besides, at the birth of children in families of distinction, it is generally an object of much anxiety to have the event authenticated. Some registry is made of it. None has been found here after the most diligent search[2]. If the register is lost, the date may always be supplied by the banquets and festivities with which it is contemporaneous. Why! the whole county would have resounded with the ringing of bells; you would have had processions of old men upon the anniversary of such a prodigy[3]. It would have excited as

the Bill by which alone it could be defeated never passed, the *onus probandi* to the contrary, rested with *those* who *disputed the fact*. It might certainly be incumbent upon the Petitioner to show that the claim was not extinguished by a former judgment, or by laches on the part of himself, or any one entitled; and this he did satisfactorily establish.

[1] Unless it was *physically impossible* for Lord Banbury to have begotten a child, the concealment of its birth would not render it illegitimate. According to this statement of the Attorney-general, the presumption of law in favour of legitimacy may be rebutted, not only by a fact, which, *even* when *proved, never had that effect,* but by the mere *presumption* of *such a fact*. There is *no proof* that the birth of either or of both the children was unknown to Lord Banbury, or that he had concealed the circumstance; and the inference which has been drawn from the settlement of his lands, and from his will, that he was not aware of the existence of Edward, the eldest child, does not apply to *Nicholas,* the lineal ancestor of the claimant, because he was not then born. The depositions of 1641, and the testimony of the witnesses in 1661, prove that the birth of Edward was not concealed.

[2] Lady Banbury being a *rigid Catholic* explains why the children were not baptized in any Protestant church, and would account for their names not being found in the register of the parish where they were born.

[3] This might possibly be the case; but it does not follow that *evidence* of the circumstance could be found two hundred years after the event. Such evidence might indeed have been produced in 1661, but the Committee for

much surprise as if a mule had been brought to bed! It reminds me of the lines of Juvenal:—

> Egregium sanctumque virum si cerno, bimembri
> Hoc monstrum puero, vel mirandis sub aratro
> Piscibus inventis, et fœtæ comparo mulæ.
>
> Sat. xiii. 65.

"In no register, in no will, in no document is there any notice of this wonderful production. And then, not content with one, the miracle must be multiplied. It was not enough that one child should be born to a man at eighty-two; he must have another when he was eighty-four. And nature consummated her prodigality, by lavishing on these children the strength and vigour [1], which she usually denies to the offspring of imbecility.

"The King's message to the House of Peers must have created a strong feeling in a numerous and jealous body to inquire, whether the Earl had really a child, and if the fact had been so, had he been so incomprehensibly foolish as to make a false representation to the King, the secret must soon have been divulged [2].

"Lord Vaux's Christian name was Edward [3], which was the name of Nicholas's elder brother. It appears

Privileges appear to have been then satisfied of the claimant's legal right without even examining all the witnesses who were summoned on his behalf; still less did they think it requisite to order further inquiries to be made.

[1] The "strength and vigour" of the children was entirely assumed, there being no evidence whatever of their physical appearance.

[2] Edward, the only child then living, was born long after the patent was granted, and he was only a few months old at the date of the King's message. As all the Peers interested in the Precedency *specially*, and *most carefully stipulated* that their consent *should not extend beyond* the *Earl of Banbury's lifetime*, and that the disputed Precedency should *not be enjoyed by his heirs*, it was wholly immaterial to them whether he had a child or not, whilst the extreme care with which every one of them added the stipulation to their consent, that the privilege should not be enjoyed by *his heirs*, tends to show that they considered it *necessary, which necessity could only arise from his having a son*. *Vide* p 345, antea.

[3] Edward was also the baptismal name of his uncle, Edward Lord Howard of Escrick, Lady Banbury's *brother*, after whom it was very natural that he should have been called.

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by the deed of 1646, that Nicholas passed in his childhood by the name of Vaux. The coincidence may be accidental. I can only say that I should have a great jealousy of any friend of mine whose names I thus found fixed to two of my children[1].

"If this question had been tried before a Court of Law, I think it would be impossible for any rational jury to decide otherwise than against the claim[2], or to believe, as has been insisted, that such a decision would endanger the title of any family that possess an hereditary seat among your Lordships."

19 March to 4 July[3] 1811.

Lord Erskine stated the case, and concluded by moving that the Committee should resolve "that the Petitioner had made out his claim to the title, dignity and honour of Earl of Banbury."

Earl Stanhope. 8th April, 1811.

Earl Stanhope:—"I think it highly important to ascertain the law by which this case is to be decided. I cannot agree with the noble Lord (Erskine) that the circumstances of this case are so anomalous, that it will be impossible for the decision to establish any

[1] Would it be just to suspect the legitimacy of two boys, because their father called the eldest by the common name of Edward, in compliment to his wife's brother, and because, on her husband's death, the widow married a man of the *same common* baptismal name, who not having any children of his own, *adopted* her *youngest son*, and gave him his *own surname*?

[2] The cases which have been cited, as well as the Report of the two Committees for Privileges, leave no doubt that if the question of Nicholas Earl of Banbury's legitimacy had been tried by a jury in 1631, when his *status* was created, or in 1661, or even so lately as 1693, their verdict would have been in his favour.

[3] The Attorney-general replied on the 16th of June 1810, and the case was not again heard until the 19th of March 1811. The Committee were engaged in discussing the subject, and in determining on the questions to be put to the Judges, on the 19th, 21st, 25th, 26th and 29th of March; 2nd, 8th and 30th of April; 2nd, 13th and 30th of May; 6th of June; and 4th of July 1811, on which day the further consideration of the claim was adjourned to the second Tuesday in the ensuing session.—*Printed Evidence.*

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Earl Stanhope.

dangerous principle; for whatever we may choose to suppose, the affirmation or negation of the principle regulating the effect of *access*, must be inseparable from our decision. The subject is of the utmost importance in point of fact, and of interest in point of principle. We are at present so divided in opinion on matters of law, that I shall move some questions to be submitted to the Judges, and I beg leave to state the grounds on which I have prepared them.

"There is a rule of law called 'quatuor maria,' and its application is limited by exceptions, such as impotency and non-access, to which exceptions we must look to find the force of the rule. They may all be consolidated into one, *i. e.* non-generating access, which includes impotency of every kind, from non-age, malorganization, &c. It also embraces both physical and moral access. By physical access, I mean instances such as where a man is in prison, and is permitted to see his wife, but is not so permitted, as to admit the supposition of his being a father. By the term of moral access, I mean that nature of access, which may be opposed to physical access, as in the question whether a will be or be not a forgery; one branch of the evidence of the forgery may be, that the testator detested and was in the habit of abusing and execrating the legatee. There is no case to which non-generating access will not apply. It is the necessary issue, and no other. Now the object of my question is, to learn from the Judges what case can be brought upon that issue, and whether the same evidence applies to that issue, as does to every other case, when a physical fact is proved.

"I submit the following resolutions to the House, leaving it to your Lordships to determine whether they shall be proposed to the Judges as questions:

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1. That the fact of the birth of a child from a woman united to a man by lawful wedlock, is by the law of England *primâ facie* evidence of the legitimacy of such child.

2. That such *primâ facie* evidence may be lawfully rebutted by evidence of natural impossibility; and that in such case, as in every other case of a *primâ facie* evidence of any right existing, the *onus probandi* is on the party calling the right in question.

3. That such *primâ facie* evidence may be lawfully rebutted by evidence that such access did not take place between the husband and wife as, by the law of nature, is necessary to admit the husband to be the father of the child."

It was proposed during the debate to put several other questions to the Judges besides those which were submitted to them, but they were afterwards withdrawn.

Lord Ellenborough.

LORD ELLENBOROUGH:—"These propositions embrace a variety of points too extensive for application to this case. There is no doubt that the presumption of the legitimacy of a child, the husband and wife having access, may be rebutted[1]. In this case, there is no proof of the access of the husband and wife; the question therefore is, whether the presumption of access can be rebutted by any circumstances[2]. This is the abstract point to be ascertained. Until we separate the law from the fact, we shall never arrive at a just conclusion. The fact is to be tried as facts are tried before a jury; the law

[1] But only by evidence of *physical* or *moral impossibility*.

[2] Sexual intercourse between man and wife, the husband not being impotent, or separated from his wife by distance, "so that he could not come to his wife," or by a sentence of divorce, is to be *presumed*. In the Banbury case neither of these obstacles existed; and no "proof of the access of the husband" was necessary: the *onus probandi* of *non-access* rested therefore with those who, upon that ground, impeached the legitimacy of the issue of the wife.

may be decided on reference to the Judges. I certainly think it desirable to have the opinion of the Judges whether any circumstances can rebut the presumption of access, and then a question arises whether the circumstances in this case constitute such circumstances?" Case of the Earldom of Banbury, 1811.

Lord Chancellor:—"I entirely agree with the noble Lord on the expediency of putting this question to the Judges. When the law is once settled, there will be no great difficulty in deciding on the evidence of the fact. I do not conceive non-access, or what the noble Earl (Stanhope) terms non-generating access, is to be presumed, because the Earl of Banbury was eighty years old. Swinburne says[1], that the possibility of issue must not be applied to a case where the husband is eighty; but he is corrected by his annotator, who observes, that to this general doctrine Englishmen of eighty formally protest. I think that an opportunity for considering the proposition ought to be afforded to the House, and the questions may then be submitted to the Judges, who may also be asked whether the judgment of the House on a preceding occasion[2] is a bar. This is an inquiry of vital importance to the House." Lord Eldon.

Lord Erskine:—"I recommend the propositions to be put in the shape of questions to the Judges. The question framed by Lord Ellenborough is unobjectionable, but in this particular case it may lead us very little out of our difficulties. The answer will be too general. No one can doubt that there are circumstances which will enable a court of justice to rebut the presumption of access, but the Judges may say that *no circumstances can be given in evidence.*" Lord Erskine.

[1] "Swinburne, 'Treatise of Espousals,' p. 50, which enters into much unnecessary detail upon this point."—*Le Merchant*, p. 431.

[2] "Alluding to the resolutions passed in 1692-3."—*Ibid.*

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Lord Redesdale.

Lord Redesdale:—"I agree with the noble Lord on the advantage of further consideration. I apprehend the law to be, that the birth of a child during wedlock raises a presumption that such child is legitimate; that this presumption may be rebutted both by direct and presumptive evidence; that under the first head may be classed impotency and non-access, that is, the impossibility of access; and under the second, all those circumstances which can have the effect of raising a presumption that the child is not the issue of the husband[1]. These circumstances are within the province of a jury, who are fully competent to decide whether they are sufficient to raise a presumption of law.

"I do not see how a question can be so stated to the Judges, as to apply to this case[2]. All that the Judges can tell your Lordships is, whether the presumption of law can or cannot be rebutted; whether it be a presumption of law, which cannot be rebutted by evidence, which the civilians term 'presumptio juris et de jure,' or whether it be one which can be rebutted by evidence. It is impossible to instance a question, where an inference is to be drawn by a jury under the direction of a Judge[3],

[1] A reference to the preceding observations on the law of Adulterine Bastardy, will show that this statement is totally at variance with the *ancient law*; and that even after it became modified by the explosion of the doctrine of "the four seas," the only admissible evidence to bastardize a child born in wedlock, was the *physical impossibility* of his having been begotten by the husband. In the *King* v. *Luffe*, Lord Ellenborough and the other Judges of the King's Bench repudiated, in the most unqualified terms, such an idea as that the presumption of legitimacy could be rebutted "by circumstances which can have the effect of raising a presumption that the child is not the issue of the husband." A presumption of that nature would only amount to an "*improbability*;" and "upon the grounds of improbability," said Lord Ellenborough, "however strong, I should not venture to proceed: The *general presumption will prevail*, except a case of *plain natural impossibility* is shown." *Vide*, pp. 171 *et seq.*, antea.

[2] His Lordship's unwillingness to refer to the Judges is deserving of notice. A similar feeling influenced certain noble Lords in 1693.

[3] The questions put to the Judges on this occasion, with their answers, have been inserted in a former part of this volume; p. 180, *et seq.*

in which the jury is not called to decide upon the facts[1].

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February and March 1813[2].

The Committee for Privileges appear to have met on the 26th of February 1813; and Lord Erskine, after some prefatory observations, renewed his motion, that "the Petitioner had made out his claim to the title, dignity and honour of Earl of Banbury."

Lord Redesdale[3]:—"This is a question not simply between the Crown and the claimant; it affects every Earl whose patent is of a subsequent date to the patent of William Earl of Banbury[4]. It is a question which

Lord Redesdale, 26th Feb. 1813.

[1] A jury under the old law was frequently called upon to decide whether the child was born within espousals, and upon one or more of the only three facts by which special bastardy could be proved, viz. impotency, divorce, and the husband not being within the four seas, the presumption of legitimacy could always be rebutted. The question which arose in the Banbury case was, whether the presumption of legitimacy could be rebutted by evidence *tending* to the *same conclusion*, namely to moral or physical impossibility. Since the case of *Pendrell* v. *Pendrell*, evidence to that effect certainly has been admitted, but there was *no case*, ancient or modern, in which that presumption was rebutted by "*circumstantial evidence tending* to a *mere improbability*."

[2] All which has been found respecting the claim during the session of 1812, is a series of appointments for taking it into consideration, and of postponements. On the 28th of April, the House ordered the Committee of Privileges to meet on the *Banbury* case on the 12th of May; but on the 8th of that month, the Committee was deferred until the first Tuesday after Whitsuntide. It was then ordered to meet on the 28th of May; then postponed to the 4th of June; on the 10th it was postponed to the 18th; and on the 19th of June to the following Thursday. The last notice of the subject was on the 25th of July 1812, when the House ordered the evidence to be reprinted before the next session of Parliament, for the use of Members.—*Lords' Journals*, vol. XLVIII. *passim*.

[3] Mr. Le Marchant says, "I have mentioned in the introductory part of this work how deeply the Profession are indebted to his Lordship for the authenticity of this report."—p. 436.

[4] It would be difficult to comment upon this sentence with too much severity. As evidence of the *animus* with which the speaker approached the subject it is however very important; and when it is remembered that his Lordship was then acting both as a Judge and a Juryman, and was addressing a body of persons to whom the same duties were entrusted, that he had

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Lord Redesdale.

has been frequently agitated within these walls, and one hundred and seventy years have elapsed since the cause of discussion arose. Your Lordships are called upon to try a fact which could not be established when the memory of it was fresh[1], and when the parties most competent and most interested to prove it being alive, the House was best qualified to give the subject a judicial determination.

"It must be observed that this delay cannot be imputed to the House, for no obstacles have ever been interposed from that quarter to the prosecution of the claim[2]. When the petition of Nicholas, the ancestor of the claimant, came under the consideration of the House in 1661, the Committee of Privileges to which it was referred, instead of reporting whether the claimant was legitimate or illegitimate, came to the extraordinary resolution that "he was legitimate in the eye of the law." It may safely be inferred that the expression could only be introduced to show that the law and the fact were at variance[3].

once filled a high judicial office, and that his opinions had great weight, this appeal to the prejudices of his auditors was, to say the least, highly objectionable. Let it be supposed for a moment that a Judge should commence his charge to a jury in these words: "This question affects every one of you, gentlemen of the jury, who holds his lands by a deed of a subsequent date to that on which the plaintiff's title rests, and the validity of which you are now to determine."

[1] The *legal right* (the only point at issue) *was established* before two Committees for Privileges in 1661; it was admitted to be so clear as to require a special Act of Parliament to defeat it, but which Act was never passed; and in 1693, when the House first came to a decision against the claim, it rejected a motion for referring to the Judges for their opinions on the point of Law.

[2] Could the noble Lord have been acquainted with the history of the claim, when he made an assertion so completely opposed by the facts? The manner in which the House postponed every effort of the claimant to obtain a decision, and avoided pronouncing its judgment from the years 1661 to 1693, has no precedent in the history of British jurisprudence; and from 1693 to the year 1806, the heirs of the first claimant presented no less than *six* petitions to the House or to the Crown.

[3] It has already been stated, that these were not the exact words of the

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" Now what was the law which the Committee followed on this occasion? Not the law of England, for it would have led them to a different conclusion; but a certain law laid down by Lord Coke in his Commentary on the Institutes[1]. We find by the minutes of the Committee that the counsel for the claimant asserted, on the authority of 1 Inst. 244, 'That it was not to be disputed whether son or no, if father be within the four seas, though the wife be in adultery,' and that the Attorney-general confessed this rule to be clear.

" I have a great respect for the memory of Lord Coke; but I am ready to accede to an assertion made by some of his contemporaries, that he was too fond of *making the law*, instead of declaring the law, and of telling untruths to support his own opinions. Indeed, an obstinate persistence in any opinion he had embraced, was a leading defect in his character[2]. His dispute with Lord Ellesmere furnishes us with a very strong instance of his forcing the construction of terms, and making false definitions, when it suited his purpose to do so. Mr. Hargrave has shown the statement of the law in the passage which governed the judgment of the Committee to be untenable. It is not borne out by the authority referred

Report of the Committee; but if the inference drawn by Lord Redesdale be correct, such a distinction was irrelevant to the only fact upon which the Committee in 1661 had to decide. The right claimed was *created* by *the law*, and if a man possessed a *legal* right, its enjoyment could not without injustice be withheld. A more dangerous principle cannot be imagined than a distinction between *law* and *fact* in cases of legitimacy; and if it were applied to all cases where scandal has dealt with a woman's fame, the Petitioner might not be the *only* person, even in the House of Lords, who would lose those rights which the *law* had conferred upon him.

[1] It is submitted that enough has been said (*vide* p. 78, *et seq.* antea) to prove the mistake into which Lord Redesdale here fell; and the noble Lord's error is fatal to the whole of his argument.

[2] Those who are best acquainted with the speeches and opinions of the noble Lord will smile at his description of Lord Coke; and may perhaps exclaim,

" ——— mutato nomine, de *te*
Fabula narratur."

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to by the text, and it is inconsistent with the earlier and later decisions[1].

"I admit that the law presumed the child of the wife of A., born when A. might have had sexual intercourse with her, or in due time after, to be the legitimate child of A.; but this was merely considered as a ground of presumption, and might be met by opposing circumstances[2]. The fact, indeed, that any child is the child of any man, is not capable of direct proof, and can only be the result of presumption;—understanding by presumption, a probable consequence drawn from facts (either certain or proved by credible testimony), by which may be determined the truth of a fact alleged, but of which there is no direct proof. Thus if A. and A.* are married, and are in such habits of intercourse that A. may be the father of a child born of the body of A*, immediately produced as the child of A., and received as such by A.[3], the child is presumed to be his child, though the fact of sexual intercourse cannot be proved; and if the death of A. before the birth of the child prevent its reception by him as his child, yet if the birth happen within a time which in ordinary course is the longest time of pregnancy before birth, the child is presumed to be the child of A.

"If a child is born of the body of A*, and alleged to the child of A., *but not so acknowledged by him,* nor produced on its birth as *his child,* yet if circumstances would admit of sexual intercourse, and the non-production of

[1] *Vide* p. 80, antea, for a *refutation* of this remark.

[2] But the *Law* carefully *defined* the "*only circumstances*" by which the presumption could be rebutted.

[3] The recognition or non-recognition, or, as the noble Lord expresses it, "reception" of the child by the husband, though an important circumstance in the *Civil* Law, was never considered necessary by the *Common* Law of this country. In the next sentence Lord Redesdale admits that the recognition, of the child was *not* indispensable for the purpose of establishing its legitimacy.

the child as the child of A. can be sufficiently accounted for, it will be presumed that the child is the child of A. But in all these cases, the fact that the child is the child of A., is a fact presumed and not proved.

"When, therefore, circumstances occur which may tend to rebut the presumption that a child born of the body of A*, the wife of A., is his child, then, presumption rebutting presumption, the conclusion must be drawn from the whole evidence[1]. So in Radwell's case, cited by Mr. Hargrave, the illness of the husband for some time before his death was admitted in evidence, and the *presumption* from that circumstance that sexual intercourse had not taken place during that period, being added to the length of time which had elapsed after the death of the husband before the birth of the child, was used to raise a conclusive presumption that the child was not his child[2]. And in a case mentioned by Lord Erskine as having happened during his practice at the bar, where a child claimed as heir of A. begotten on the body of A* his wife, and produced as such on its birth, and proof was given that A* had been married to C. before her marriage with A., and that C. was living after the marriage, and the evidence of the former marriage destroyed the claim of the child as the legitimate child of A.; and then a claim was set up for the child to other property as the child of C., who was living in the neighbourhood of A* during the time of her pregnancy and until the

[1] It has been shewn that the presumption of legitimacy could not be rebutted by any "*presumption*" whatever; and that the only mode (except in cases of divorce) by which the presumption of legitimacy could be rebutted was by evidence that it was *impossible* for the husband to be the father of the child.

[2] Radwell's case was that of a *posthumous* child; and during the whole of the arguments on the Banbury claim, the distinction between a child *born during the existence of the coverture*, and a child *born after the husband's death*, seems to have been lost sight of. Radwell's case was almost one of *impotency*, which has always been a cause of special bastardy; and that case was, moreover, distinguished by many peculiar features.—*Vide* p. 32, antea.

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birth of the child; the jury *presumed*, from the fact of the second marriage, and the production of the child at its birth as the child of A., that it was not the child of C.[1]

"Acknowledgement of a child by the reputed father and mother as their child, is generally the only evidence of the fact even that the child is the child of the woman, unless evidence of the persons present at its birth can be produced, and such acknowledgment is sufficient evidence, if not rebutted by clear evidence to the contrary, which was attempted in the Douglas case.

"It is therefore of high importance to consider, in a question of legitimacy, whether the fact of such acknowledgment as would demonstrate the legitimacy did take place, or whether by circumstances such acknowledgment was rendered impossible, as by the child being a posthumous child. If, on the contrary, it appears that the supposed father was ignorant of the birth of such a child, and that the fact of its birth was concealed from him, such concealment is strong presumptive proof that there had existed no sexual intercourse which could have made him the father of such child[2].

[1] This case is similar to that of *Goodright and Saul*, and both of them were decided long after the doctrine of the *quatuor maria* was exploded. The facts of these cases bore no resemblance to those of the Banbury case.—*Vide* p. 143, antea.

[2] Evidence of the concealment ought, however, to be of the *most conclusive* description; but even if it could be proved that the birth of a child of a married woman was concealed from the husband, and if circumstances shew that the husband might *have had*, and that he probably *did have*, sexual intercourse with his wife when the child was begotten, such concealment would not bastardize the infant. It is not difficult to imagine various motives which, however improbable, *might* induce a married woman to conceal the birth of her child from her husband. She may, from affection for an adulterer, wish it to be considered as his offspring; she may have quarrelled with her husband, and secreted the child from revenge to disappoint his hopes of an heir; she may be bribed by those who would benefit by her husband's dying without issue; but an infant cannot be deprived of its legal status by the acts of a vicious or unnatural parent.

" In this case there is the strongest evidence[1] which the circumstances can admit, that the Earl of Banbury was utterly ignorant of the existence of the two children which, a considerable time after his death, were alleged to be his children, and that the Countess and her family acted in the Earl's lifetime, and after his decease, as if the Earl had been without children, to the utter ruin of the children if they were really the children of the Earl.

" Lord Banbury was possessed of two very considerable estates, Caversham and Rotherfield Greys. By his marriage-settlement (23rd November 1604, 3 Jac. I.) being then Lord Knollys, he covenanted, in order " to make a provision for his intended wife, and for the continuance of the manors, &c. in his Lord Knollys's name and blood to settle Caversham to the use of himself and his wife in tail male, with remainder to the heirs male of the body of his father;" thereby showing that, in default of his own male issue, he contemplated the devolution of his property to the descendants of his father. Rotherfield Greys was the gift of the Crown, and being protected by the statute of Hen. VIII., the entail created by the grant of the Crown could not be barred[2].

" In the year 1627, Edward, the first son of Lady Banbury, came into the world. After a marriage of twenty

[1] There is no *evidence* whatever, much less " the strongest evidence which the circumstances can admit," that Lord Banbury was ignorant of the existence of the two children; nor is there any *proof* that they were not alleged to be his children until a considerable time after his death. Nine years certainly elapsed before the date of the Depositions in Chancery and of the second Inquisition, but there is no *evidence* that they were not *produced* and treated as Lord Banbury's children long before that time.

[2] Enough has been said (*vide* p. 375 *et seq.*, antea) to show that the inferences drawn by Lord Redesdale, from the settlement of the manors of Caversham and Rotherfield Greys, are by no means conclusive, or justified by the facts. Whether the entail of Rotherfield Greys could or could not be barred, it is indisputable that *it was then supposed that it could be barred*; and the consent of the Crown was obtained for settling that property on the Earl's nephew, Sir Robert Knollys. Such being the opinion at the time, it fully explains why measures were not taken for recovering those lands.

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years, Lord Banbury's bed ceased to be barren[1]; a child was born to him in his old age, and a prospect was held out of the transmission of his title to posterity. Can any one doubt that this event must have been the source of the most lively satisfaction to him?

"Three years after (in 1630)[2], Lady Banbury was delivered of a second son, Nicholas, the ancestor of the present claimant. It was at or about the period of the birth of Nicholas that Lord Banbury was induced by his age and infirmities "to put his house in order," so as to rid himself of all worldly cares for the future. His first act was to levy a fine of Caversham[3], which according to the limitations in his settlement would descend to his eldest son, and to convey the fee absolutely to Lady Banbury[4]. By another deed, he covenanted to levy a fine of Rotherfield Greys to Sir Robert Knollys (his nephew), his heirs and assigns for ever. It is true that he does not mention Sir Robert in the deed as his heir male, as he is named in a subsequent schedule, but it is evident from the tenor of the instrument that he considered Sir Robert in that light, and as the representative of their ancient family[5]. By these deeds Lord Banbury deprived

[1] The "barrenness of their bed" was entirely assumed, there being nothing to show that they had not other issue who died in their infancy; and it has since been ascertained that Lady Banbury had a child, if not children, who died in infancy, long before the birth of her sons whose legitimacy was in dispute.—*Vide* pp. 306, 307, antea.

[2] *Four* years, viz. in January 1630-1, *i. e.* 1631.—*Vide* p. 306, antea.

[3] Nicholas was not born until one year and two months *after* that fine was levied.

[4] The Earl's attachment to, and confidence in his wife were shown upon every occasion, and are sufficient to account for any act in her favour. But though the settlement alluded to probably arose from his affection for her, there might have been other reasons consistent with the existence, and even with the interests of his children, for vesting the fee-simple of that estate in his widow. Be this, however, as it may, an act of imprudence on the part of an old, and perhaps doting husband in favour of a beloved wife, cannot justly be adduced to prove that he had no children.

[5] There is *not one word* in that instrument to justify such a conclusion, and the tenor of it is of an *opposite* description. It has been shown (*vide*

himself of the means of providing for his two children[1], for he wholly denuded himself of his property. At the same time he made his will, whereby, *without noticing any issue*, he leaves his wife his residuary legatee[2].

"Can it now be doubted that the birth of these children was concealed from Lord Banbury? Can it be believed that he would have left the immediate successor to his title, the eldest branch of his family, the offspring of his old age, in unmerited indigence, in order to bestow his territorial domains upon his nephew? That in no one transaction since his marriage, from his settlement down to his will, should he mention his children, while he was the fond and devoted husband of their mother? The presumption arising from such a series of acts on the part of Lord Banbury is almost tantamount to his absolutely declaring himself to be childless, and it can hardly be strengthened by his testimony to that effect[3]. However, the records of the House place the fact beyond the reach of incredulity. His patent of Earl is dated the 18th of August 1626. The House was moved to consider the patent on the 22nd of March 1627[4]. It was referred to a Committee of Privileges, and the Earl

p. 375, antea) that, under the previous settlement, Rotherfield Greys would have devolved upon Sir Robert Knollys, as next heir male of the Earl's father, in the event of the Earl's dying without issue male. Lord Banbury was then above eighty years of age, and if Sir Robert Knollys was, as is contended by the opponents of the claim, his heir male at the time when he settled that manor upon him, for what possible reason should the Earl have taken the trouble of giving him property which must in a very short time have been his without any proceeding of the kind?

[1] Only *one* child was then born, or indeed conceived.

[2] Instances of this kind are extremely common even where there are several children. Weak as the inference drawn from this fact is, it could not possibly prove anything against the legitimacy of *Nicholas*, because he was *not born until several months afterwards.*

[3] It is a sufficient answer to these deductions to say that most of them are drawn from *false premises*; many of the circumstances which are here assumed as facts having no other existence than in the imagination of the speaker.

[4] *i. e.* 1628.—*Vide* p. 294, antea.

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Marshal reported the law to be against the precedency granted by the patent, adding that whilst the discussions were pending, a message was received from the King, in which he desired that this departure from the ordinary privileges of the Peerage might pass for once "in this particular, considering how old a man the Earl was and childless." An order of the House was passed on the 10th of April 1628, reciting these particulars[1], and on the 15th of April 1628 Lord Banbury took his seat, according to that order.

"Edward was born one year[2] after the date of Lord Banbury's patent, so that he was alive at the time when Lord Banbury suffered the King to inform the House that he was childless, and at the time when he took his seat upon the faith of that assertion. We must suppose Lord Banbury to have spoken the truth when he so in effect declared himself childless[3], or we must consider him to have been guilty of the grossest deception upon the King and upon the House.

"Thus Lord Banbury dies, believing himself, and being believed by the world, to be childless. The time was not yet arrived for the development of this conspiracy. The first Inquisition was held at the proper period, *i. e.* immediately on the decease of the Earl, and at the proper place, *i. e.* in the neighbourhood where his family had so long resided. Lady Banbury was alive; her connexions, the friends of her deceased husband, occupied the highest posts in the kingdom. The proceedings of the Inquisition were public, and must have been well known to the Countess, as it found her title to a con-

[1] Lord Redesdale omitted to notice the reservation so carefully made by all the Lords who were affected by the grant of Precedency, that it *should not be enjoyed* by the Earl of Banbury's *heirs*.—*Vide* antea, p. 300.

[2] Eight months.

[3] There is not the slightest proof that Lord Banbury was privy to the King's communication to the House. He was no party to it, and was not present when it was made.—*Vide* p. 342 *et seq.*, antea.

siderable property; it also found a deed to which she was a party, conveying a large property to a collateral branch of her husband's family, a deed wholly irreconcileable with the legitimacy of her children; and it is also found that, the Earl dying without issue, a small property descended to the heirs of the body of his elder brother as his heir at law[1]. What could have produced such findings by the Inquisition but a general reputation that the Earl had no child? What could have caused the Countess to suffer such findings to remain undisturbed[2] but a consciousness of their truth? Nothing has ever transpired to throw suspicion on the authenticity of this document[3].

"The second Inquisition was irregular. It is dated eight years after the first; an interval that afforded sufficient time for contrivance. It could have little weight as long as the first Inquisition remained in force, for the parties might have quashed the first Inquisition by a writ de melius inquirendo, before they could have properly disputed its veracity[4].

"The marriage of Lord Vaux with Lady Banbury is the prelude to the production of the children. From that period the children seem to have been avowed by that nobleman as the issue of his adulterous intercourse with

[1] The remarks which have been made upon these points are too long to be repeated in this place.—*Vide* antea.

[2] That Lady Banbury did *not* "allow such findings to remain undisturbed" is shown by the Depositions in Chancery, and by the second Inquisition in 1641.

[3] The *correctness* of this Inquisition in other matters besides the finding of the heir is rendered doubtful by the error respecting the place of the Earl's death, as it states that he died at Caversham, whereas the second Inquisition states that he died in London, which is corroborated by other circumstances.

[4] A reference to what has already been said (p. 358 *et seq.*, antea) on this subject will prove that there was *nothing* "irregular" in the second Inquisition, and that the first Inquisition could not be quashed until it had been found by a second, that the party disputing the first was the heir at law of the deceased.

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Lady Banbury. By the deed of the 19th of October 1646, he settles his estate on Nicholas, and it is impossible to devise a more clear designation than that which Nicholas here receives from his mother and the person suspected to be his father. He is not stated to be the son of the late Earl of Banbury, though the Countess is described as the Earl's widow; and the admission that he had gone by the name of Vaux, leaves no doubt that he had recently assumed the title of Banbury[1]. If the declaration of parents[2] can in any case be evidence, this is an instance in which it ought to be admitted. It is generally excluded, from the apprehension that it may be the result of some unnatural hatred towards the child. Here the motives of the parent were unequivocally parental, and the welfare of the child was the sole object of the declaration. Besides, this was no inconsiderate exclamation—no hasty unpremeditated act,—it was an allegation on a record framed after due deliberation under legal advice, and the veracity of it was attested by Lord Vaux and Lady Banbury themselves coming into court and solemnly acknowledging their deed.

"This settlement was not the only instance given by Lord Vaux of his paternal affection towards the offspring

[1] Lord Vaux married Lady Banbury within six weeks after her husband's death, and nearly a year elapsed before the first Inquisition was taken. The conjecture "that the children were avowed by Lord Vaux as the issue of his adulterous connexion with Lady Banbury," is not justified by any one fact. Nicholas could not possibly have assumed the title of Banbury long before the deed of the 19th of October 1646 was executed, because his *elder brother did not die* until about that time.

[2] The declaration of the only surviving parent of Nicholas in this deed, so far from being "an admission of his illegitimacy," was a positive statement that he was the legitimate son of the late Earl of Banbury. He is called "son of the said Countess," because she was one of the parties to the instrument, and is styled "Earl of Banbury." It is true that he is there said to have once borne the name of Vaux, but, for the reasons before given, it is not just to infer from that circumstance that he was the son of Lord Vaux. *Vide* p. 368 *et seq.*, antea.

of Lady Banbury. He[1] instituted a suit in Chancery for perpetuating the evidence of the legitimacy of Edward. The depositions of the witnesses having been declared to be inadmissible in these proceedings, I shall make no comment on them, but I ask, why did he not attempt to quash the Inquisition which had found Lord Banbury to die without issue, which had designated Lord Banbury's nephews [nieces] as his heirs, which had sanctioned the disposition made by Lord Banbury of his property to the prejudice of these children? Edward or Nicholas might in succession have established their title by ejectment if it had been valid[2]. The courts of law were as open to litigants during the civil wars as in the most profound internal peace.

"All these circumstances combined to rebut the presumption in favour of legitimacy arising from the birth of the children during their mother's marriage, and to afford decisive presumptive proof that they were not the children of Lord Banbury, but the offspring of an adulterous intercourse between Lord Vaux and the Countess; the fact of that intercourse[3], coupled with the conceal-

[1] The suit was *not* instituted by *Lord Vaux*, but by the Earl of Salisbury, who had married Lady Banbury's sister, and is called Edward's "guardian and prochein amy."

[2] The Inquisitions have been already noticed; and reasons have been stated for believing that the opinion then prevailed that the Earl of Banbury *had the power*, with the consent of the Crown, to *alienate* his property, and that an *ejectment* could *not have been* brought either by Edward, who died a minor, or by Nicholas, who did not attain his majority until 1653.

[3] Lord Redesdale first *assumes* that there *was* an adulterous intercourse between Lord Vaux and Lady Banbury, of which there is *no proof whatever*; and then, in the very next sentence, deduces "from the *fact* of that intercourse," that the birth of the children was concealed, and that there was no sexual intercourse between the Earl and the Countess, of which these children could have been the result. Thus, his Lordship first *assumes* facts, and then draws inferences which those facts, even if they were established, would not warrant. If Lord Vaux did intrigue with Lady Banbury, it by no means follows that she should not also have occasionally had sexual intercourse with her husband.

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ment of the birth of the children, affording the strongest presumptive evidence that there was no sexual intercourse between the Earl and Countess, the result of which could be the birth of those children.

" I may also observe, that after the death of the Earl of Banbury, the dignity of Earl of Banbury was never inserted in the list of Peers, according to the common practice, during a minority[1].

" So the question stood at the time of the Restoration. The first notice of Nicholas on the records of this House is on the 13th of July 1660, an early introduction of the subject, considering the circumstances under which the Peers had met. It was nothing more than a voluntary meeting of a few members, and a Committee was appointed to consider to what Lords letters should be addressed to desire their attendance. A list was given in, but I have been told that the list which has been produced is not the list which was approved of by the House. It is to be presumed[2] that this list contained only the names of the Peers who had previously taken their seats. It appears by the minutes, though not by the journals, that several Peers who had not sat in the House since the decease of their fathers attended in the lobby, and offered their attendance if it should be thought proper, and the inference is, that the Lords who had not previously taken their seats had no letter sent to them, and

[1] It was *not* the common practice to insert the name of minor Peers in the " Lists of Peers." *Vide* p. 395, antea.

[2] The noble Lord admits that little was known respecting these lists; and there is no foundation for his conjecture respecting their contents. See some remarks on the convocation of the Peers on this occasion, pp. 324–327, antea. The fair inferences from all the facts which are now known on this subject are that Lord Banbury was written to, pursuant to the order of the House of the 3rd of May 1660 (*vide* p. 327, antea), and that he could not have entered the House had he not received a letter commanding him to attend. It must be remembered that he evinced no haste to take his seat, as he was not present until the 4th of June, about six weeks after the House met.

consequently Lord Banbury was without a letter, and he must have introduced himself into the House without the sanction of any of the existing authorities. The attention of the whole country was so deeply engaged, that a matter of this description was likely to have escaped notice[1]; and either his sitting in the House, or his obtaining leave of absence from it, creates no presumption in favour of his right[2].

"On the 6th of June 1661 the petition of Nicholas was presented, and the Chancellor stating the King's pleasure that no writ should be issued to him, the House resolved that the petition should be referred to the Committee of Privileges.

"This Committee met on the 17th of June to examine the witnesses in support of the claim, and out of the nine that appear to have been sworn only four were examined. The minutes are imperfect, but they probably contain the substance of the examination, and we must take them as they stand, their inaccuracy being as likely to favour as to prejudice the claimant.

"Of these four witnesses the first is Ann Delavall, who was probably a servant of Lady Banbury at the time of the birth of Nicholas. She is indeed a most feeble auxiliary[3]. Her answers betray a consciousness of guilt and a dread of detection not easily paralleled. Like false witnesses in general, she denies all knowledge of every

[1] This supposition is destroyed by the fact that Lord Banbury's right *was* questioned soon after he took his seat, and that the subject was ordered to be investigated. *Vide* p. 325, antea.

[2] This extraordinary observation, which only derives importance from being additional proof of the *animus* of the speaker, carries it with its own refutation.

[3] Lord Redesdale's remarks upon these witnesses have already been noticed, *vide* p 333, *et seq.*, antea. It is therefore sufficient to observe here, that his Lordship does not hesitate to impute motives, to assume facts, and to draw conclusions, without there being, in many cases, the slightest foundation whatever, for such motives, facts, or conclusions.

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thing except the circumstance she is brought forward to prove. When she is asked whether Lord Banbury saw the child, a fact of which it was impossible for her to be ignorant, she says she was not there to know it. There is not one of her answers that does not admit of a double interpretation, and is not equivocating and evasive.

" Mary Ogden comes next, and her evidence is of as suspicious a complexion as that of the preceding witness. She was at the birth of Nicholas; she had nursed him for fifteen months, and she had known him ever since. From her we should expect an elucidation of all the mysteries that had involved this extraordinary transaction. The questions put to the witness are such as to elicit the truth. ' Did Lord Banbury ever see him (Nicholas)?'—' I know not.' No one after this could doubt the fraud that had been practised upon Lord Banbury. But this is not all:—This witness, the child's nurse, does not even know whether Lord Banbury ever knew that his lady lay in; and when questioned as to the concealment of the child, ' whether he was allowed to be seen by strangers?' instead of returning a direct answer, she says, ' The household saw him.' A jury could do no otherwise than infer that the existence of the child was kept a secret by Lord Vaux, Lady Banbury, and their associates, until the death of Lord Banbury.

" Anne Read and Edward Wilkinson are the two remaining witnesses, and they are worthy of their companions. The former being asked whether she was not enjoined to conceal the birth of Nicholas? answers, that she knows no cause of concealment. The question then is, ' Were you not cautious to keep the child secret?' Answer, ' I was never commanded to keep him secret.' And Edward Wilkinson, who has the assurance to depose that Nicholas is the son of Earl William, admits that he does not know whether the Earl knew that he left any

issue. This is the whole of the testimony with which Nicholas sought to remove the imputations that hung over his legitimacy. He brought no more witnesses to the bar[1].

"Lord Vaux, at whose house he had been born, and by whose name he had been called in his childhood, was still alive, and the most natural guardian and supporter of his rights. There can be only one reason for his absence[2].

"Where was the register of baptism? If it had been lost, the production of the child from its infancy, the recognition of the child by the husband and wife, its nurture, and its treatment as it grew up, the reputation at home and abroad, the belief of relations, friends and neighbours, was the evidence which ought to have been resorted to[3]. It was incumbent on Nicholas to combat the general reputation then prevalent that the Earl had died without issue; a reputation founded on the Earl's disposition of his property, on his representation to the

[1] Lord Banbury offered to produce no less than *nine* witnesses, but as the Committee for Privileges were satisfied that he had made out his claim after hearing the evidence of only *four* of them, the non-examination of the others *does not weaken his case.*

[2] Lord Vaux's evidence was not so material as that of the persons who were examined, unless indeed he could have been interrogated upon the two most important points of the case, viz. whether *he did*, and whether Lord Banbury *did not* have sexual intercourse with Lady Banbury between the years 1626 and 1631? It must not be forgotten that the Countess of Salisbury, Lady Banbury's sister, was produced by the Petitioner, as one of his witnesses, but the Committee did not examine her. To this material fact Lord Redesdale makes no allusion. Moreover, Lord Vaux, at the time when those proceedings took place, was probably incapacitated by illness from attending the House, as he died on the 8th of September following, at the age of seventy-four.

[3] The register of the parish in which Nicholas was born does not now exist, and it is uncertain when it commenced. Moreover, as Lady Banbury was a strict Catholic, it is not likely that her children would have been baptized in the parish church. Evidence tending to establish many of the points alluded to by the noble Lord, were produced in 1661, and satisfied two Committees for Privileges of the claimant's legal right.

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King, on the Inquisition held at his death, and on the conduct of Lady Banbury and Lord Vaux, both before and after his decease, confirmed as it was by Nicholas submitting to the penalties of illegitimacy by his acquiescence in the alienation of the patrimony of the Earldom[1]. Several questions were addressed to the witnesses respecting the facts by which this reputation had been created, and very unsatisfactory answers were obtained. The presumption against the legitimacy remained in full force. General reputation of legitimacy would have been evidence in favour of the legitimacy of Nicholas, so general reputation that there existed no issue of Lord Banbury was evidence against such legitimacy[2]: and it is to be observed, that the general reputation was, not that the children were illegitimate, but that there were no such children; a reputation which could have arisen but from the concealment of the fact of their birth, which concealment could only have proceeded from the fact, that they were not the children of the Earl of Banbury.

"It is evident why Nicholas abstained from calling more witnesses to these facts; and we can only account for the neglect of the Committee by supposing that they

[1] It is irksome to repeat that the noble Lord seems here to have again mistaken the facts of the case, and consequently to have made untenable assertions, and drawn inferences from false or assumed premises. The general "reputation," if indeed there was any such "reputation," that the Earl died without issue, was contradicted by the Depositions and Inquisition of 1641, and by the witnesses before the Committee for Privileges in 1661. It is *not proved* that the Earl made the representation to the King that he was childless; and reasons have been given which explain why Nicholas did not claim the estate of Rotherfield Greys—reasons which abundantly establish that his acquiescence in the alienation of that property cannot, with a shadow of justice, be called "submitting to the penalties of illegitimacy." The estates in question must have been called "the patrimony of the Earldom" for the sake of effect; for they were "the patrimony" of the heirs male of the family of Knollys *long before* the *Earldom or Barony existed.*

[2] It is at least a novel doctrine that the legitimacy of a child born in wedlock in the year 1631 could be affected "by general reputation of illegitimacy," when the parties were both capable of procreation, and were living together on terms of perfect harmony.

considered the claim to decend on a question of law[1] rather than a question of fact. Otherwise they were highly censurable in not making further inquiries. The House was dissatisfied with their Report, and most justly, for the presumption in favour of the legitimacy of Nicholas from his birth during marriage, still continued to be opposed by the strong presumption against his legitimacy, raised by all the circumstances alluded to in the evidence. A day was appointed for hearing counsel and examining witnesses. Counsel were accordingly heard on the 9th of July. A long debate followed on the 10th, which led to a resolution, sufficiently expressive of the sense entertained by the House of the justice of the claim:—'Ordered, that there be no Writ sent to the Earl of Banbury to Parliament, and that Mr. Attorney-general do prepare a bill to prevent things of this nature for the future.' 'The Earl of Banbury's business recommitted to the Committee of Privileges to consider of the matter now in debate[2].'

[1] There can be little doubt that the Committee looked only to the *Law*, and it would have violated its duty if it had allowed itself to be influenced by any other consideration whatever. As the whole of this part of Lord Redesdale's argument is presumed to be founded upon *a mistaken view of what was Law* at the time when the children were born, and when the claim was originally investigated, it would be useless to do more than to refer to what has been stated on that subject.

[2] The whole of this statement of the proceedings in 1661 is at *variance with the facts*. On the 1st of July 1661 the Committee for Privileges reported in favour of the petitioner (*vide* p. 342, antea). On the 9th and 10th of July the claim was heard before *the whole House*, and the order of reference to the Committee, as it occurs on the *Journals*, *instead* of being, "that no Writ should be issued to the Earl, and that the Attorney-general should bring in a Bill to prevent things of this nature in future," was in terms that scarcely admit of any other construction than that the House was *satisfied* of the Earl's *right* to the Dignity, because the Committee was directed to report "on the matter of the right of Precedency between the said Earl of Banbury and other Peers." Pursuant to this order the Committee again took the matter into consideration, and reported on the 19th of July in favour of the claim, adding what Precedency the Earl should enjoy; and the House resolved to take that Report into consideration on the following Monday: but on the 25th of that month it was resolved to consider the Report after the adjournment (*vide* p. 387, antea). Parliament met on the 20th of November;

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" A fresh report was made by the Committee, to the same effect as the former[1], and carrying with it as little weight; for no additional evidence appears to have been adduced.

" On the 9th of December 1661, a Bill to bastardize Nicholas was brought in by Lord Northampton[2]. It certainly was not in conformity with the previous resolution, for the object of that was to declare the law to be different from Coke's exposition of it[3], and to make a prospective provision for persons in the situation of the petitioner. The Bill now introduced was confined to the case of the petitioner, and on that ground was doubtless disapproved of by the House, as a harsh exercise of legislation, and therefore dropped. If however the facts stated in it were true, a jury would now[4] find Nicholas to be illegitimate; and the framer must have supposed the facts to be true, or he would not have so worded the preamble. There was a dispute between the House and the Committee, and nothing further was done[5].

and on the 28th the House appointed the 9th of December for the consideration of the business, on which day the Bill for bastardizing the Earl was first read. Lord Redesdale's statement is founded on an *entry in the* " *Minute-book,*" which it is presumed was made some time afterwards, *instead of being founded upon the resolution of the House, as it appears on the Journals.* *Vide* p. 385, antea.

[1] The second Report, on the 19th of July, also stated what Precedency the Earl ought to be allowed, pursuant to the order of the House. *Vide* p. 387, antea.

[2] The Journals do not state by whom the Bill was brought in. The point is no otherwise important than that Lord Northampton was a *member* of the *second Committee for Privileges* which *reported* in *favour* of the Earl's right, and *he presented that Report to the House.*

[3] The object of the Bill which the Attorney-general was directed to prepare was to *alter the Law,* and *not* to declare the Law to be different from Lord Coke's exposition of it.

[4] Whether a jury would or would not in 1813 have found Nicholas illegitimate upon such facts as were then alleged, was not the question: the real question was, would a jury have found a verdict to that effect in the year 1661?

[5] The dispute between the House and the Committee *occurred five months before the Bill was brought in.*

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" These proceedings, though not decisive, are yet altogether most unfavourable to the claimant. The Report amounts to a verdict against him upon the evidence, as the construction of the law which was supposed to have defeated the effect of the evidence is now proved to be untenable[1]. We thus know the opinion entertained by the Committee of the fact[2], as separate from the law, and that opinion being no longer governed by a false conception of law, must operate to its full extent.

" The doctrine of law set up in the Committee was not recognized by the House[3], and it may be urged that the House virtually rejected the claim by not proceeding on the report. The report resembled the verdict of a jury finding *the law* (according to their opinion of the law), as compelling them to find against their opinion as to *the fact*. If a jury had found such a verdict under a mistake of the law, it would have been the duty of the Judge to tell them that they were mistaken in point of law, and if the Judge had not set them right, the Court would have ordered a new trial. The House in fact declared that the Committee were mistaken in point of law. In my opinion the issue of this petition may be considered as a sort of nonsuit in ejectment[4]. The

[1] It is confidently submitted, and is presumed to have been proved, that the construction given to the Law by the Committees in 1661 was not *only* the *sound* and *proper construction*, but that no *other* construction could have been given without departing from the entire body of Law authorities, as well as from every precedent upon record.

[2] Neither of the Reports of the Committees make any allusion to the *fact*. They were ordered to investigate a claim to a Common Law right, and intended to Report, *first*, that " according to the Law of the land he is legitimate," which was altered to, " that he is a legitimate person ;" and *secondly*, " that in the eye of the Law he was the son of the late Earl." *Vide* p. 341, antea.

[3] The House did not, however, deny that the view taken of the Law by the Committee was correct. On the contrary, the correctness of its opinion was tacitly *admitted* by ordering a Bill to be brought in to effect an object which could be attained in no *other* way.

[4] The whole of this part of the noble Lord's speech proceeded upon the idea that the Committee were *mistaken* as to the *Law*, and that the

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claimant was competent, through the intervention of any member of the House, to bring his claim to a decision, but he tacitly abandoned it[1]. He also abstained from submitting his pretensions to any other tribunal. It was open to him to bring an ejectment for the recovery of Rotherfield Grays[2], and the proof of his legitimacy in such a suit would alone have entitled him to a favourable verdict. The bounty of Lord Vaux had placed him in affluent circumstances, and the proceedings in the House must have inspired him with additional motives for establishing his legitimacy. These proceedings in the House related to Nicholas's title to the Earldom of Banbury, and not to his title to the estates. The subsequent proceedings in the House strengthen the presumption against the claim. Why was nothing done from 1661 to 1669? And when Nicholas presented his petition, it was at the close of that very stormy session when the temper of the times was such that an inquiry of this nature could not then be prosecuted with any prospect of success. This was his last attempt; he died in 1673. In 1685 a petition was again presented, and nothing done upon it[3]; but in 1692 a fresh proceeding took place, on the petition of Charles (the son of Nicholas), claiming to be tried by his Peers; which to me

House was sensible of, and wished to correct the error,—than which nothing can be imagined more opposed to the fact.

[1] As the House had rejected the Reports of its Committees, and allowed a Bill to be brought in to disqualify the claimant, it would have been sheer insanity for him to have pressed his claim at that time. The Bill hung in *terrorem* over him to *destroy* his *legal right* the *instant* he *ventured* to *assert it*; but so far, however, from having "tacitly abandoned it," he continued to use the title of Earl of Banbury; and in 1669 he again presented a petition to the King, when the House *purposely avoided pronouncing judgment on his case.*

[2] This is more than doubtful, and there is evidence that a contrary opinion then prevailed. *Vide* antea.

[3] *Vide* antea for an account of these proceedings, where it is shown that the petitioners *did every thing in their power* to bring their claim to a decision, but that the House prevented them from doing so.

affords the strongest arguments against the present claim. If Charles Knollys had been a Peer, his petition could not have been rejected, and the withholding of the writ of summons would have been a breach of the privileges of the House. The petition led to a review of the evidence which had been given before the Committee in 1661; and the House, with this evidence before them, after having heard counsel for the Crown and for the claimant, went into a debate, which seems to have been of unusual length. It was first moved that the petitioner was the son of a supposititious child of Lord Banbury; but this being opposed, probably on the ground that if he was legitimate by law it would be unconstitutional to make him illegitimate by vote, it was moved to call in the Judges to consult them on the law. The House must have been satisfied that the law had formerly been misunderstood, for the motion was negatived[1]; and the question was then put, 'Whether the petitioner had any right to the Earldom of Banbury?' and it being resolved in the negative, it was ordered that the petition should be dismissed.

"This resolution, passed as it was with great solemnity, ought in my opinion to have all the force of a judicial decision. No doubt can be entertained of the jurisdiction of the House; for surely it had a right to determine whether the petitioner was entitled to be tried as a Peer, and this could not be done without ascertaining whether he was legitimate.

"The House was not at liberty to assume his legitimacy, and they did not travel out of the petition in inquiring into the fact on which it was grounded. It is

[1] As the motion for taking the opinion of the Judges *proceeded* from those Peers who divided the House in *favour* of the claim, they must have believed that their opinion of the petitioner's right would be supported by that of the Judges.

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true there was no reference from the King[1], but I conceive this defect is not fatal, for the petition answered the purpose of a reference, and estopped the petitioner from objecting that he did not submit to the determination of the House. Whatever informality may have been committed was to the prejudice of the Crown, and not of the petitioner. This view of the question was adopted by the Committee of the House to whom Charles Knollys's claim was referred in 1697; for after stating these proceedings in their Report, (calling the said resolution a judgment as well as a resolution), they go on to observe that the judgment was not known to the Crown at the time the reference was made, which of course makes it manifest that the House conceived that had it been known it would have been considered conclusive, and as barring a reference. The House in fact treated it in that light, for the claim was dropped[2]. Nothing more of it is heard during the life of this claimant, but it is revived by his son. Lord Hardwicke, who was then Attorney-general, reported upon it, and his report shows that his opinion coincided with the opinion of the Committee in 1697. He concludes by saying, 'But your Majesty hath been pleased to observe that there appears to have been a difference of opinion between the House of Peers and the Court of King's Bench,

[1] Upon this fact, the legality or illegality of the resolution of the House in 1692–3 depended. Lord Chief Justice Holt, and the other Judges of the King's Bench, were unanimously of opinion, that without such reference the House had no jurisdiction; and the House tacitly acknowledged that this opinion was well founded, by abandoning the proceedings with which the Judges were threatened.

[2] The claim was *never* "dropped." As the House considered that the proceedings in 1693 were conclusive, and formed a bar to any future reference, the claimant had no means of prosecuting his right. He *never abandoned* the title, and the moment a change took place in the state of political affairs he renewed his claim in the most urgent manner. Can it then be said with truth that the claim was "dropped" because no possible means then existed for pursuing it?

touching the effect of their Lordships' vote of the 17th of January 1692 [1692-3], whereby it was resolved that the petitioner had not any right to the title of Earl of Banbury; the Judges of the Court of King's Bench having adjudged that the same was extrajudicial, and did not conclude and bar the petitioner of his claim to the said title, and the House of Peers appearing to have been of a contrary opinion in their representation to his then late Majesty King William the Third, wherein they expressly called that resolution a judgment of their House, and on that account declined entering into the merits of the reference made to them by his said late Majesty: and whether under these circumstances your Majesty will think fit now to make a new reference to the House of Lords, is a consideration not of law but of prudence, which must be left to your Majesty's royal determination.'

" The reference, to use the words of Lord Hardwicke, was no longer a matter of right; had it been otherwise, the ministry of George the Second, a Whig ministry, was not of a description likely to concur in withholding any right from a subject. They advised his Majesty not to send the petition to the Lords, and the ground of their advice must have been the deficiency of any new light on a case which had been already decided by the House in 1692. They treated the resolution then passed as deciding the right, and concluding the question. In the view of the King, of the House, and (as far as acquiescence[1] goes) of the claimant, the resolution was considered as conclusive. If the proceedings in this House are liable to be invalidated on such slight grounds[2], the House is little entitled to the appellation of a Supreme Court of Judicature.

[1] It has been placed beyond dispute, that the claimant never acquiesced in the resolution of 1693.

[2] " Slight grounds!" The House proceeded, without the only authority which could justify it in acting at all in the matter, to pronounce a resolu-

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'I cannot approve of the conduct of Lord Holt upon this occasion. The House acted with great propriety. Suppose a person claim the privilege of Peerage and to be tried by his Peers, and the House determine that he is not so entitled, and he still pleads the fact; if the Attorney-general take issue on that fact, it would come to be tried before a jury, and they might decide that he was so entitled, which would place the House in an awkward position, whilst the delinquent would not be tried at all. I consider the abandonment of the proceedings in 1727 as an abandonment of the claim[1]. If a petition were presented to the Crown in the nature of a writ of right, claiming lands, and the Crown refuse to act on the petition, and refer the question of right to trial in the ordinary way, I conceive the Crown would do wrong, if the claimant showed a ground of right in his petition; and in 1727 the claimant might have petitioned the House upon rejection of his petition by the Crown[2]. It would have been the constitutional duty[3] of the House, as well as its duty to itself and its members, when informed of that rejection, to have inquired whether the Crown had been rightly advised on this subject.

"I think Lord Chief Justice Holt was mistaken, if

tion which deprived a man of a most important right of inheritance, and rendered his father a bastard, yet its decision on that occasion could not, in Lord Redesdale's opinion, be considered illegal, without the fact causing the House to "be little entitled to the appellation of a Supreme Court of Justice."

[1] As the Crown refused to refer the claimant's petition to the House, he was totally prevented from prosecuting his claim.

[2] The petitioner's case mainly rested upon the illegality of the proceedings of the House in 1693, because those proceedings took place without a reference from the Crown; consequently he could not, without an obvious inconsistency, petition the House to do in 1727 that, which, upon his own showing, it could not legally do, except upon a reference from the Crown, and which reference was then denied.

[3] The claimant's grievance was, that the House *neglected* "its constitutional duty" on every occasion when his case was brought before it.

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what fell from him is correctly reported; otherwise the Crown might refuse a writ in a subsequent Parliament to any Peer now sitting in the House[1].

"The claimant in 1727 not having taken any steps upon the rejection of the petition, the further lapse of time before the last application gives additional weight to the presumption against the claim. This House is governed by laws analogous to the laws of the land[2]. It would be indeed absurd that the acquiescence of the successive claimants in the successive express and implied rejection of a claim did not impeach the validity of such claim. In law, the failure to bring a matter before a jury when the memory of the transaction is fresh, raises a strong presumption against the right, and it is the duty of a Judge, where the statute of limitation does not apply, to point out to the jury the force of this presumption. In cases where the statute does apply, he should lay a stress even on suspense. As enjoyment for a length of time may create a presumption against the Crown, so non-enjoyment for a length of time may create a presumption in favour of the Crown. Suppose an information of intrusion filed in 1661, in which the Crown had not thought fit to proceed, and accordingly no verdict is given on the case. Another information of the same kind is filed in 1692, and a verdict is given thereon against the Crown. A third information is filed in 1727. Would

[1] "Peer or no Peer," is a question of fact which the House is competent to try, upon a reference from the Crown; and Lord Holt merely insisted upon the necessity of such a reference to give validity to its judgment. The case put by Lord Redesdale applies only to a case in which the Crown refused a writ to a Peer, whose right had been *properly* tried by the House.

[2] No point has been more clearly established, and in a great degree by Lord Redesdale himself, than that the descent of Honours is not governed by the same rules of Law as those which relate to lands, or in other words, the Common Law.—*Vide* Reports of the Lords' Committees on the Dignity of a Peer of the Realm: Third Report, pp. 36-49; Fourth Report, pp. 14, 16.—Report of the claim to the Earldom of Devon, pp. 32, 39, 40-45, 72 to 84, 107, 195.

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not the jury have told the Crown that the neglect for so long a period created the strongest presumption against its right? Independent of any other part of the case, I think lapse of time a sufficient ground for rejecting this claim, and I am persuaded that it is as important to hold lapse of time on a question of Peerage to afford the same objection to a claim of Peerage as it does to a claim of any other description[1]. When a Peerage falls into abeyance, no one of the coheirs has a right independent of the favour of the Crown, but where the right is entire, and no disability can be suggested, non-claim constitutes a strong ground of presumption (against the right) that the right was barred, or the claim not well founded, though the objection to the claim may not, in consequence of the lapse of time, be clearly shown. Lord Hardwicke thought that the lapse of time, coupled with the previous proceedings in the House, was conclusive against the claim, even in 1727. Who can question what he would have thought in 1811?

"I feel perfectly confident that had I been a member of this House in 1661 or 1692–3, I should have opposed the claim[2]. I might possibly have considered the decision in 1692–3 as somewhat defective in point of form, but I should have decided as the Lords then decided, for I am sure that their decision was just. Had I been Attorney-general in 1727 or in 1807, I should have advised his Majesty not to refer the petition to the House, on the grounds that the resolutions of the House

[1] The claimants never, for a single moment, acquiesced in the rejection of their claim; and there was no neglect on their part in prosecuting it; but the House itself created all the obstacles, which obstacles are here imputed to the claimants. It has been repeatedly decided that *time is no bar* to a claim to a Peerage.

[2] The whole tenor of the noble Lord's speech, which resembled much more that of an *advocate*, than of a *Judge*, certainly renders this extremely probable; but had he filled a judicial station in 1661, it is fair to suppose that he would have known what the Law then was, and knowing, that he would have administered it.

in 1692–3 were final [1], and that the claim must labour under all the disabilities which the law has attached to lapse of time."

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Lord Ellenborough:—"The importance of this case has led me to devote to it a larger portion of time than I could conveniently spare from my necessary occupations. I have thought it my bounden duty to exert my utmost diligence to collect all possible information, so as to enable me to form the most correct judgment that my mind is capable of arriving at, and I trust that I have not toiled in vain. Yet I do not rise without some apprehensions. The honourable character of the claimant and his military connections have begotten a friendly feeling among many members of this House, which has led to a sort of sympathy among others not so connected. I entreat every Peer to make a covenant with himself, that affection shall not influence his judgment. If any other motive than a love of justice should actuate the opinion I shall have to offer, I should be unworthy of my place here and of the reputation I have obtained for the impartiality of my opinions in general. I am chained to the law of the land, and if ever I swerve from that, I trust I shall receive the reprobation of the world. I am bound by my oath to try this question according to the best of my judgment, and I consider this obligation as the most solemn by which my conscience can be affected.

[1] An Attorney-general would scarcely presume to advise the Crown to act in direct opposition to an unanimous judgment of the Court of King's Bench, more especially as that judgment was tacitly acquiesced in by the House after repeated but fruitless and undignified struggles with the Judges who pronounced it; nor would he venture to advise the King that time *was a bar* to a claim to a Peerage, when it had been decided by the House, in the cases of Willoughby de Broke in 1691, Berners in 1720, and Botetourt in 1764, *that time was not a bar.*—*Vide* Report of the Claim to the Barony of Lisle, pp. 106. 108. 316.

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"The descendant of Nicholas Vaux is now endeavouring, after a feverish period of 180 years, to establish the legitimacy of his ancestor. The sole question before the House is, whether Nicholas was the legitimate son of William, Earl of Banbury?

"It has been urged with great force by a noble and learned Lord (Redesdale), that the very remote date of the cause of this discussion is alone fatal to the claim. The case is of such a size, and of so peculiar a nature, that the technical rules followed in other Courts of Law should be applied to it with caution; yet in the absence of precedents I am disposed to adopt the sort of reasoning upon which all statutes of limitation are founded [1].

"The arguments against the claim have been objected to as fallacious, because they rest only on presumption. All cases of this kind must be governed by the presumptions arising from the fact of marriage. The presumption in favour of legitimacy is sometimes strong, often weak, sometimes irrefragable. But being a presumption alone, and not a rule of law, it is liable to be repelled by circumstances inducing a contrary presumption. Let a man live with a woman as if they were husband and wife, let them have children, let the access, let the production and the recognition of the children, be proved; —if evidence could be given that he had not the organs of generation [2], all this would go for nothing.

"It was always open to discussion in the Civil Law, whether the supposed father was in fact the father. If the child was born of the wife, 'viro suo hoc ignorante, si in domo susceperit.'

[1] *Vide* the note to the last page, where it is shown that time was no bar to the claim.

In that case the legal presumption in favour of legitimacy would be rebutted by a *physical fact*, which has always prevailed against such presumption.

"Bracton and Fleta both show that these principles were early introduced into our own law, and in the reign of Edward I.[1] a child was declared illegitimate notwithstanding the coverture and cohabitation of its mother and ostensible father[2]. The presumption of *real issue* was always open to discussion[3]. (Here his Lordship entered into a very minute examination of the early authorities, concluding with Lord Coke.)

"It appears to me, and I trust on an attentive examination of the proceedings in 1661 it will appear to all the House, that the Committee had little doubt that Nicholas was illegitimate, but they felt themselves bound by a known rule of law which had till then been acted upon, but which ought to have been held null[4].

[1] *Foxcroft*'s case, 10 Edw. I., 1 *Roll.* 359.

[2] The *marriage* of the parties in this case *was invalid*: the erroneous construction here given to Foxcroft's case has been pointed out; and it has also been shown that the *rules* of the *Civil* were *never introduced into the Common Law.*—*Vide* p. 30, and Appendix.

[3] Mr. Le Marchant observes, "My notes of this part of Lord Ellenborough's argument are too imperfect to be printed. This circumstance is the more unfortunate as his Lordship possessed a profound knowledge of the subject, and considered himself bound to be very explanatory on this occasion, because his judgment in the *King* v. *Luffe*, which involved the same principles, had not been universally approved of. If I might venture to draw any inference from the fragments now before me, I should say that his Lordship treated the cases in the Year Books as establishing that the presumption in favour of legitimacy might be disputed on certain grounds, which constituted, as it was termed, the special matter why it should not prevail. He argued that this special matter ought not to have been confined to impotency and divorce, but held co-extensive with the rules laid down in Bracton."

As the notes of this part of Lord Ellenborough's argument are confessedly imperfect, it is only necessary to observe, that whether in his opinion the "special matter," by which alone a child born in wedlock could be bastardized, ought or ought not to have been confined to impotency, divorce, and absence "extra quatuor maria," or whether it should be extended to the rules laid down by Bracton, was *irrelevant* to the case on which he was sitting in judgment; for it is obvious that that case depended solely upon what *were* and not upon what *ought to have been* the rules of Law at the period when the claimant's ancestor was born; and it has, it is submitted, been shown that the view taken of the Law by the Lords' Committees in 1661 was perfectly correct.

[4] Rules of Law are solely created by, and founded upon, *precedents*,

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"Thus the law stood at the time when Coke wrote, and at the time when the Committee sat. The authorities have since varied. The case of *Hospell* v. *Collins*, decided by Lord Hale, left the presumption of legitimacy to the consideration of the jury, who were at liberty to infer whether the husband had access to his wife, from all those circumstances which would have qualified them to determine whether the husband was the father of the child. Unfortunately this case is not reported at length, at least I have not been able to find it after a careful search[1].

"I do not oppose this claim on the ground of the impossibility of procreation by a person so old as Lord Banbury, though that would be a cogent point. It is on the *moral* and not on the *physical* impossibility of Lord Ban-

authorities, and usage. It is here said by Lord Ellenborough, that the rule by which the Committee felt themselves bound *had till then been acted upon*, which must mean, that it had governed all previous decisions, for there is no recorded case in which a different rule prevailed; but his Lordship added, "that *rule* ought to have been *held null*," though in the very next sentence he observes, "*thus stood the Law* at *the time Lord Coke wrote*, and *at the time when the Committee sat*." It is certain that if that rule of Law "ought to have been held null," it was upon principles established *before* the commencement of the Year Books, and in accordance with the principles of the Civil Law, the encroachment of which on the Common Law was firmly and jealously resisted by our ancestors. The fallacy of this part of Lord Ellenborough's argument is obvious. If the Law was such, as he admits it to have been in **1628** and **1661**, the tribunal which had to try a right of inheritance founded upon that Law, could not depart from, or bend, its rules, to meet a supposed variation between the *de jure* and *de facto* paternity of the claimant without aviolating of its duty: nor could the application of those rules of Law to his case be withheld without injustice. The conduct of the Committee, which Lord Redesdale impeached, is therefore justified by Lord Ellenborough; and if its Report was, as Lord Ellenborough admits, consonant with the Law as it then stood, it follows that the claimant's right was indefeasible.

[1] Although it is true "that the authorities have since varied," the variation did not exist when the original claimant was born, or when his claim was first tried; and his descendant was *entitled to have his case adjudicated by the Law which created his ancestor's legal status, and not by an ex post facto variation from that Law*. Hospell, or Dickens and Collins's case has been commented upon, and reasons stated for doubting its authority. —*Vide* p. 122 *et seq.*, antea.

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bury being the father of the claimant that I rest my objections. When applying the reason of man to the conduct of man, your Lordships must be governed by the induction which reason suggests. If this rule is observed on the present occasion it must lead to the result that it is morally impossible that William Earl of Banbury should be the father from whose loins either Edward or Nicholas issued[1].

"The case of *Corbyn*, decided by Lord Talbot, is one upon which this doctrine precisely stands. The parties were living under the same roof; they appeared to the world to be living as husband and wife, and to have full opportunities of sexual intercourse. Yet the child was declared illegitimate[2]. And the same verdict was given in *Pendrell* v. *Pendrell*, though there was no divorce, no separation, no physical impossibility, but the jury inferred from the distance at which the parties resided from each other, the infirm health of the husband, and the profligacy of the wife, that it was morally impossible for the husband to be the father of the child[3]. It was

[1] It is difficult to understand by what process of reasoning Lord Ellenborough could arrive at this conclusion. It is not denied that Lord Banbury was a hale and vigorous man until a few months before his death, and it has been proved that he was often in the presence of, and living with, his wife on terms of the utmost affection. Under such circumstances there is absolutely nothing to justify the idea that he had not occasionally had sexual intercourse with her; and if it be conceded that he might, and probably did have such intercourse, there is not a shadow of pretence for bastardizing the children.

[2] The facts of Corbyn's case are not known.—*Vide* p. 133, antea.

[3] In Pendrell's case the husband and wife had separated, he residing in London and she staying in Staffordshire, and three years afterwards a child was born. As, however, some doubt existed whether the husband had not been in London within the year preceding the birth of the infant, an issue was tried; but as the jury were convinced that the husband *had not had access* they found against the legitimacy.—*Vide* p. 127. Thus, there was *evidence* of *non-access*. In the Banbury case the *parties were living together*, and evidence was adduced in 1661 to prove that they had been seen in the same bed. Moreover, the case of Pendrell occurred *one hundred years subsequent to the birth* of *Nicholas* Earl of Banbury, and long *after* the *old rule of Law was exploded*.

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not from one fact alone, but from a combination of facts, that they arrived at this conclusion. And we shall find, upon examining the remaining cases, that by the same reasoning, the relative situation of the parties, their habits of life, and many other circumstances, constitute the medium by which the jury may collect the paternity.

" The authorities cited by Lord Erskine do not apply. It will be observed, that *to exclude the possibility*, never formed part of the legal question[1]. Upon this false assertion of the law rests the claim of Nicholas Vaux[2].

" I now come to the facts as they appear upon the evidence. There was a great disparity of age between Lord and Lady Banbury, and they had been married twenty-one years without having any issue[3]. He was created an Earl in 1628, with a patent of precedency, which the King in his message to the House excused on the ground of his being old and childless. The period at which the message was sent deserves the particular attention of the House, for Edward had then been born some months. Was it consistent with the character of the Earl or of the King that such a message could have been sent, if either of them had known of the existence of the child? The only object of the message was to acquire a precedency, which the Earl must have regarded as a trifling consideration in comparison with the privilege of transmitting his newly acquired honours to a male heir. To

[1] To " exclude the possibility " *did* unquestionably " form part of the legal question," except in the special cases of *impotency*, *divorce*, and *absence from the realm*, until the commencement of the 18th century.

[2] The party through whom the claim was made is here again *assumed* to be Nicholas *Vaux*, or, in other words, the issue of the adulterer; and notwithstanding Lord Ellenborough had before admitted the correctness of the opinion entertained by the Committee of the Law as it stood in 1661, he here calls it " a false assertion of the Law."

[3] This fact is assumed without *proof*. There was nothing to show that they had not many children who died infants; and it has been since discovered that Lady Banbury had had another child, if not children, long before the birth of these sons.—*Vide* p. 307, antea.

suppose the Earl privy to the birth of the child, would be to suppose a corruption in which the King and the Earl participated, and to which the House became accessary. Can your Lordships by your vote declare that they would be guilty of such a fraud, and for so foolish a purpose? Is it probable that so singular an event as the birth of a child, after twenty-one years' marriage, to so old a man, should be unknown to the Peers present? You must either assume that the King and the House were fully impressed with the belief that the Earl was childless, or come to the other conclusion, that the fact existed, and the Earl was utterly ignorant of it. Is it possible that he should be ignorant of it[1]. I might as well be told that Abraham was ignorant of Sarah's delivery. If such an event had happened, would not the Earl have hailed a child born in his extreme old age? Would not the first inceptions of pregnancy have been noticed with rapture by him, and all who took an interest in his welfare? In 1630 [1631], when Nicholas is stated to have been born, the same ignorance existed, though he would have had double cause for rejoicing. If conscious of the birth of these children, the most natural duty of the Earl was to provide for them. Two considerable estates were settled upon his issue: one of his last acts is to divide these estates between his wife and the individual who was his heir in default of his having issue, and he closes his life by bequeathing the residue of his property to his wife, without noticing any issue in his will[2].

"If this claim is well founded, I ask whether there ever was a case so anomalous? I have never heard or read

[1] This argument has been already noticed.—*Vide* antea, p. 342.

[2] *Vide* antea, for a refutation of part, and of the inferences drawn from the rest, of this statement.

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of such an one, or of such an instance of neglect and undutiful conduct of a parent towards his offspring[1].

"The Earl's death is followed by a commission of escheat. The proceedings were before the proper authority, and they are stated in the body of the inquisition. The escheator must have had reference to the deeds in the possession of the Countess, for they are recited in the inquisition. The person who framed the answers to the commission must also have had documents. The commission therefore could not have been executed clandestinely, or indeed without the full knowledge of the Countess. The language of the inquisition is explicit: it finds the death of the Earl without issue, and mentions with some precision the relationship of two ladies, who were his co-heiresses. Edward and Nicholas, though both alive, are both overlooked.

"Lord Vaux and Lady Banbury had been some years married before it occurred to them to set up these children. The first step they took was to file a bill to perpetuate the testimony of witnesses supposed to have been present at the birth of Edward. This appears to have been a mere collusion. Who were the witnesses? Lady Banbury, from whose womb Edward sprung, was not examined. They would not have so acted if they had been conscious of his legitimacy. Edward would have fought, not for the paltry bowling-green at Henley, but for the noble possession of Rotherfield Greys[2]. He might have accomplished this object without filing a bill, either by

[1] Caversham was settled by the Earl on his wife, "and her heirs," *before the birth* of Nicholas; and if she justified the confidence which he placed in her, by not disposing of that property, his children would have succeeded to it. The case would have been very different, and the inferences of Lord Ellenborough perfectly correct, if those children had not also been the children of *Lady* Banbury.

[2] *Vide* antea, where it is shown that Rotherfield Greys was considered to have been legally settled on Sir Robert Knollys.

proceeding in ejectment, or bringing a covenant of lease, or he might have pursued a more compendious course: he might have distrained for rent, and in an action of replevy he might have proved himself son and heir of the lessor. But this would have defeated his purpose. The truth would have come out upon a cross-examination. The deeds respecting Rotherfield Greys must have been produced, the inquisition scrutinized, Lady Banbury must have accounted for her silence.

" I would not have alluded to the depositions in 1640, because they have not been received in evidence, had not their exclusion been lamented as injurious to the claimant. The curiosity of the House towards them has been excited by repeated injunctions not to read them. I sincerely wish they had been produced.

" No one can doubt, from the conduct of William Earl of Banbury, that he was not the father of these children. It is equally clear who was. The early marriage of Lord Vaux with the Countess[1], the affection of that nobleman towards Nicholas, shows the nature of the connexion between them. It was the duty of Lord Vaux to make every reparation to Nicholas for the injury he had done him; his Lordship therefore very properly settled upon him all his estates. The deed was enrolled. Lady Banbury was a party to it. If the gift had been made to him by the description of Nicholas Earl of Banbury, he could not have taken[2], therefore the description of Nicholas Vaux is added. By this industrious description his succession was ensured. I beg your Lordships to bear in mind this description of Nicholas, when you advert to the evidence of the witness in 1661, who never

[1] *Vide* antea, where it is contended that the early marriage admits of a contrary inference. Men are not usually in haste to marry a woman of whose person they have had four years' possession, except from motives of interest, which did not exist in this case. All the points here assumed as facts, are mere *assumptions*.

[2] He was further identified " as the son of the said Countess of Banbury," one of the parties to the settlement, and as William the first Earl of Banbury, her husband, was then dead, it was not necessary to refer to him.

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knew him called by the name of Vaux. If ever there was a name with a pestilence about it, under the peculiar circumstances connecting these individuals, it was the name of Vaux, and that name is assigned to Nicholas by the deed. Is any such description ever given of a person who has not uniformly borne such a name? It proves that the real natural father was settling upon his child the bulk of his property, and that he might not miss his purpose, he gives him every description he can give him, except that he was the son of the Earl of Banbury[1].

"The evidence before the Committee does not deserve a moment's consideration. The witnesses manifestly perjured themselves. Mary Ogden was the nurse of Nicholas for fifteen months. Can it be believed that she should never have been present at some moment when the child was exhibited to his father? It was admitted before the Committee that Lord Banbury had the reputation of having died childless. Why was not this reputation distinctly and explicitly accounted for or disproved? There could be no difficulty in procuring testimony to meet it. Nicholas was surrounded by his friends and protectors. Lord Vaux was still alive. Lady Salisbury was actually summoned. If the public incredulity was unfounded, they were the only persons to remove it. Their absence confirms the suspicion which must have arisen from the examination of the witnesses. So far from agreeing with the Attorney-general of the day that the claimant's title was clear, I think it was disproved by his own witnesses. They established a case of moral impossibility that Nicholas could be the son of Lord Banbury[2].

[1] All these circumstances are susceptible of a totally different construction.—*Vide* antea, p. 368 *et seq.*

[2] It is presumed that it is only requisite to refer to a former part of this volume, for proof of the untenable nature of these observations on the evidence in 1661. If the Attorney-general and the Committee had not

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" These proceedings may be said to have deprived Nicholas of his peerage, but they had no reference in point of law to his title to the estates of Lord Banbury. Is it to be supposed that he would have submitted to the loss of property which Lord Banbury had no right to alienate from his issue; that he would not have taken some steps to recover it—if he could have proved his legitimacy[1]?.

" The determination of the House in 1692–3 that Charles Knollys had no right to the Earldom of Banbury was valid, though it may not have been conclusive against the claimant. The Court of King's Bench ought to have submitted to it: but Lord Holt had some peculiar opinions upon the jurisdiction of Parliament. His argument is very unsatisfactory. Charles Knollys claimed to be tried as a Peer. It was a step to the induction, to see whether he was entitled to a writ. I cannot agree that when a man applies for a favour in respect of a quality belonging to him, you should not be at liberty to inquire whether that quality really belongs to him. The question was one of difficult consideration, and the Peers were right in seeking the best information; and there was no impertinence in applying to the Judges, who were from all circumstances the best qualified to afford it. There was no denial of justice. The claim was the subject of a very long debate; it passed through the Committee in the usual form, and in the resolutions which followed, the report is styled a judgment. It was within the prerogative of the Crown, if it was dissatisfied, to have referred the petition back again to the House, and so far it was not conclusive; but in this respect no judg-

been satisfied of the legal right of the claimant, after examining only four of his witnesses, he would doubtless have produced the others whom he had summoned, one of whom was Lady Salisbury, his maternal aunt.

[1] The argument respecting the estates has been noticed before.

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ment of this House in questions of this nature can be conclusive.

"Upon reviewing the evidence, and the Parliamentary proceedings relative to this claim, no doubt remains upon my mind that the claim did not deserve to be referred to the House by the Attorney-general, and that it is incumbent on every member to vote against it.

"I entreat your Lordships to let none but a judicial motive place within your walls the person sought to be intruded upon you[1]. As the law was, and as it now is, he cannot be considered as legitimate. It would be a crime committed in a court of dernier resort, to admit such a claim."

Lord Erskine.

LORD ERSKINE:—"Notwithstanding all that has been urged by the noble and learned Lords opposite, I adhere to the opinion I expressed at an early period of this debate. I admit that the claimant labours under great disadvantage. The facts involved in his case are extraordinary, and the grave has long since closed over

[1] The caution to the House with which his Lordship commenced and concluded his speech against allowing any other than "a judicial motive" to place within its walls, "the *person* sought to be *intruded* upon it," might perhaps have been addressed with greater propriety to others, than to those to whom it was intended to apply. The most fitting commentary upon Lord Ellenborough's speech will, however, be found in his own judgment in the *King* v. *Luffe*, only four years before:

"We may adopt other causes [besides impotency] *equally potent* and *conclusive*, to show the ABSOLUTE PHYSICAL IMPOSSIBILITY OF THE HUSBAND'S BEING THE FATHER. I WILL NOT SAY THE IMPROBABILITY OF HIS BEING SUCH, FOR UPON THE GROUND OF IMPROBABILITY, HOWEVER STRONG, I WOULD NOT VENTURE TO PROCEED." "The *general presumption* [in favour of the legitimacy of a child born in wedlock] *will prevail*, EXCEPT A CASE OF PLAIN NATURAL IMPOSSIBILITY IS SHOWN."—*Vide* p. 171, antea.

It is certain that, in the *Banbury* case, there was *neither physical nor moral* IMPOSSIBILITY; and no one can doubt that, in the whole of his Lordship's argument, *he did "venture to proceed"* upon "*improbability.*" *See* also the opinions of the other Judges in the *King* v. *Luffe*, pp. 172, 173, 174, 175, antea.

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all the individuals whose evidence could afford him any assistance. His claim is almost as old as the patent of his ancestor, and successive generations have passed away without a recognition of it by this House. Yet time would be the instrument of injustice if it operated to raise any legal bar to the claimant's right. Questions of Peerage are not fettered by the rules of law that prescribe the limitation of actions, and it is one of the brightest privileges of our order, that we transmit to our descendants a title to the honours we have inherited or earned, which is incapable either of alienation or surrender. But I will go further, and assert that lapse of time ought not in any way to prejudice the claimant, for what laches can be imputed in a case where there has been continual claim? Nicholas, the second Earl of Banbury, presented his petition as soon as there was a monarch on the throne to receive it, and a series of claims have been kept up by his issue to the present hour.

"It appears to me of the first importance, that the law by which this case is to be decided should be accurately laid down. The facts of the case are only of importance with reference to the law, and any conclusion that may be drawn from them, which is not applicable to the law, is equally idle and irrelevant. If a former Committee endeavoured in their resolutions on this claim to distinguish the law from the fact, they cannot be too severely censured, as nothing could be more opposed to justice than such a distinction. Legitimacy in law and legitimacy in fact cannot be at variance; they are in every respect identical, and the apparent ground of distinction between them originates in an erroneous notion of the idea they purpose to convey. Legitimacy is the creature of law, and the term has no other meaning than that which is affixed to it by law. It is the designation of a particular status, the qualities of which have

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been enumerated and defined by law, as best adapted to preserve the order and security of society. When a question of legitimacy arises, and the claimant has proved the facts which constitute his legal title, whatever suspicions may exist to the contrary, the verdict must be given in his favour. These facts may be very far from convincing the Judge that the claimant was actually begotten by his ostensible father: yet the Judge has no alternative, for the claimant has fulfilled the conditions prescribed by the law. The province of the Judge has been circumscribed by the lawgiver, and it would be a breach of his duty were he to extend his inquiry beyond the limits within which the question is confined.

"The rules relating to the bastardy of children born in wedlock may be reduced to a single point, *i. e.* that the presumption in favour of the legitimacy of the child must stand until the contrary be proved, *by the impossibility* of the husband being the father; and this impossibility must arise either from his physical inability or from non-access. It has been urged that strong *improbability* is sufficient[1], but this I confidently deny. We do not sit here to balance probabilities on such a topic as this. We must not forget that the real matter in controversy is of a very peculiar nature. Suppose two horses and one mare in the same pasture-ground, and no other horse could obtain access. The mare foals. If it were a question of property to ascertain by which horse the foal had been begotten, the party would succeed that could show the greater number of probabilities in its favour: the colour, the shape of the foal, and whether the mare had been with one horse more than with another, would come into consideration. But it is not so with the human species; we stand on a higher ground.

[1] *Vide* Lord Ellenborough's judgment in the *King* v. *Luffe*, just cited.

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The obligation and contract of marriage being the source and fountain of all social ties, the law feels itself bound to give confidence to persons so connected, and rejects the imputation of a breach of contract, unless it be proved in either of the ways above mentioned. The coverture creates the presumption of access, and access is synonymous with sexual intercourse, except in the cases of physical inability. It is vain to say, that the presumption of sexual intercourse ought to yield to evidence which shows the fact to be highly improbable. The fact is a necessary concomitant to the status, therefore the presumption would be incontrovertible, unless certain exceptions to it had been created by law. A presumption, as long as it stands, is equivalent to proof; indeed, proof is nothing more than a presumption of the highest order. Even the physical inability, by which the presumption of sexual intercourse may be encountered, is only a simple presumption. I cannot contemplate a case where physical inability can be made the subject of demonstration[1]. Men of science, from their observations on the human body, may be able to satisfy their minds of the existence of the physical inability, but in our inquiry into it we must go by the ordinary rules of nature. An infant of seven years of age was lately exhibited that apparently possessed the powers and capacity of manhood[2]; but if this monster had been married, would the issue of his wife have been held legitimate, in opposition to the established presumption of law with reference to infants of that age? Unquestionably the presumption would prevail. A chain of evidence may be perfect though every link of it is not equally

[1] There assuredly are *many cases* in which physical impossibility for procreation in either sex, and more particularly in males, may be the subject of demonstration.

[2] "For a very singular instance of this kind of deformity, *see* Paris and Fonblanque, Medical Jurisprudence, vol. I. p. 189."—*Le Marchant*, p. 466.

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perceptible. In murder, you must prove generally how the deceased came by his death, as by poison; but it is not necessary to give evidence of his having drunk the draught; so in arson, it is not necessary to see the torch put to the dwelling. Having laid down these rules, which the law has established for the protection of this very helpless class of the human race, I take it upon me to say, that to make a child that is born in wedlock legitimate, *there is no necessity to prove actual intercourse*; for legitimacy is the inevitable result of access, save where the law has established certain exceptions. These principles are unshaken, and while they remain so, the exceptions which rest on the same grounds cannot be extended.

"The nature of the presumption arising from the access of the husband being ascertained, it is evident that if access can be proved, the inference from it is irresistible, whatever moral probability may exist of the adulterer being the father: whatever suspicions may arise from the conduct of the wife, or the situation of the family, the issue must be legitimate. Such is the law of the land. Women are not shut up here, as in the eastern world, and the presumption of their virtue is inseparable from their liberty. If the presumption was once overthrown, the field would be laid open to unlimited inquiries into the privacy of domestic life: no man's legitimacy would be secure, and the law would be accessary to the perpetration of every species of imposture and iniquity.

"The civil law regards the presumption arising from access as insurmountable, except on proof of physical inability[1]. Our law fully supports the principles I have laid down. The rule is not only given by Lord Coke, but

[1] "Digest, 1. 6. 6. which is confirmed both by the ancient and modern civilians. Zouch, Quæstion. Civi. Ed. 1659."—*Le Marchant*, p. 468.

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by succeeding writers. In the case of *Hospell* v. *Collins*, Lord Hale held that the issue to the jury was confined to the question of access. In *Pendrell* v. *Pendrell*, the sole subject of discussion was the access. It was proved that the husband and wife had lived apart, that in fact the presumption of access could be met by proof of non-access. In the case of *Thompson* v. *Saul*[1], in which I was counsel, the evidence against the legitimacy was not confined to the reputation of three generations to the adultery of the wife, and to the treatment of the child. The great point was the non-access. The husband lived in Norwich, and the wife in London, and the other circumstances all tended to controvert the access. It was strictly a case of non-access.

" Mr. Beachcroft has furnished me with an accurate account of a trial[2] which lately took place at Welshpool, in which the sole question was the legitimacy of a child named Lloyd. The husband was a lunatic; the wife lived in adultery with a Mr. Price, who was proved to have slept with her at the time when the issue was supposed to have been generated. The counsel dwelt strongly on the state of the husband and the adulterous intercourse of the wife. But there was no proof of non-access, and it was imperative on the jury to find for the legitimacy.

" The same doctrine was followed by Lord Ellenborough in the case of *Boughton* v. *Boughton*[3]. It is

[1] *Goodright* v. *Saul, vide* p. 143, antea. " Lord Erskine's statement is confirmed by a manuscript report of this case in my possession, taken by a gentleman at the bar (the late C. S. Lefevre, Esq. M.P.), in which it is expressly stated that Mr. Justice Ashurst considered the circumstances sufficient to raise a conclusive presumption of non-access, and on that ground alone was of opinion that a new trial should be granted."—*Le Marchant*, p. 469.

[2] Mr. Le Marchant observes, " I have not been able to procure any particulars of this case."—*Ibid.*

[3] " This case was tried at the Middlesex Sittings, K. B. 1807. Lord Erskine stated the case from a report of it in the Morning Post (now before me). I have corrected his Lordship's statement by comparing it with the

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a case almost parallel to the present. In the year 1774, Salome Kay, the wife of a person in very humble life, left her husband, and became the mistress of Sir Edward Boughton. From that time she continued to live under the protection, and wholly at the expense of Sir Edward, and she ceased to hold any intercourse with her husband, or to bear his name, having resumed that of Davis, which was her maiden name. In March 1778, she was delivered of a girl, who was baptized and registered by the name of 'Eliza, daughter of William and Salome Davis.' (William Davis, the brother of the mother, being a servant of Sir Edward Boughton.) Sir Edward brought up and educated Eliza Davis as his child; and by his will, dated on the 26th of January 1794, he devised considerable estates to her, by the description of his daughter Eliza, for her life, and after her decease to the heirs of heir body in tail general, provided she married with the consent of her guardians, and the husband she married should take upon him the name of Boughton. After the death of Sir Edward, in 1798, Miss Davis, being still an infant, presented a petition to the Chancellor, stating that she was about to intermarry with Colonel Braithwayte; and as her guardians were not competent to consent to her marriage, *she being an illegitimate child,* she prayed that Ann E. and Richard S. might be appointed her guardians, to consent to her marriage. The Chancellor, by an order, dated the 9th day of August 1798, granted the prayer of the petition; the guardians were appointed, and the marriage solemnized by licence. Doubts were afterwards raised on the legality of the marriage, upon the ground *that Miss Davis could not be considered an illegitimate child, Mr. Kay, the husband of her mother, having been alive at her birth,*

papers in the cause, which a professional friend had the kindness to procure for me. *Vide* also *Boughton* v. *Sandilands,* 3 Taunt. 342, where the facts of the case are noticed."—*Le Marchant.*

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and therefore her legal father, and the only person qualified to consent to her marriage. The Court of Chancery directed an issue to ascertain whether the marriage was legal, and the Court of King's Bench decided that it was not. The only question in the cause was the illegitimacy of Miss Davis, and stronger circumstantial evidence of that fact could not perhaps be brought forward in a case of this description. The separation of the husband and wife, the intercourse of the latter with Sir Edward Boughton, and the recognition of the child by that gentleman, were fully established. The baptismal register, the conduct of the mother, the reputation of the world, and the proceedings in Chancery, marked her as an illegitimate child. The single circumstance of the mother's husband being alive was all that could be urged to the contrary. The legal presumption in favour of legitimacy wrung a verdict from the jury, which no one can doubt they would gladly have withheld.

" From these principles, supported by these cases, I infer that without proof of non-access, the presumption derivable from access must be conclusive.

" Such is the law of England as it existed from early times to the present hour. I am not here to defend the law, but to administer it. Perhaps the lawgiver may have laid down a rule not always infallible; he may in some instances have diverted hereditary wealth from its proper channel, by enriching the fruit of an adulterous intercourse; and he may thus have created the relation of parent and child where it had no real existence. In my opinion, these occasional and very rare deviations from justice amount to nothing more than the price which every member of the community may be called upon to pay for the privileges of an enlightened code. No laws can be framed sufficiently comprehensive to embrace the infinite varieties of human action; and the

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labours of the lawgiver must be confined to the development of those principles which constitute the support and security of society. He views man with reference to the general good, and to that alone. He legislates for men in general, and not for particular cases. No one can doubt that the interests of society are best consulted, by making a question of such frequent occurrence as legitimacy, to rest on a limited number of distinct facts, easy to be proved, but not to be counterfeited, instead of leaving it to be the result of inference from a series of indefinite facts, separately trifling, and only of importance collectively, from the object to which they are applied. Marriage and cohabitation afford us a more sure solution of the question of legitimacy than we could arrive at by any reasoning on the conduct of the husband and wife. The conduct of Lord and Lady Banbury may be satisfactorily accounted for by the supposition that Nicholas was considered illegitimate by his mother; but if she cohabited with Lord Banbury at the time of the conception, she may have been mistaken in her judgment of the father to whom she assigned the child; and it would be monstrous that the status of any individual should be left to the determination of the very party who is expressly disqualified by law from giving any evidence on the subject.

This was the policy of the law; and when it appeared to be manifestly unjust in an individual case, the Legislature interposed by a special Act [1], the effect of which was confined to the party who was the object of it. Several of these Acts may be found on the records of this House; but none of them were passed, except under circumstances which left no doubt that the husband was not the father of the child proposed to be bastardized. I need not observe that these Acts are not declaratory of

[1] *Vide* pp. 59-61, 64, 87, antea, where these Acts are alluded to.

the law; they create exceptions from the law, otherwise they would have been unconstitutional encroachments upon the functions of the ordinary courts of justice, and an abuse of the jurisdiction of the House. A rule is often ascertained by knowing the exceptions to it. These Acts constitute an unanswerable argument to show, that had the legitimacy of Nicholas laboured under even more serious imputations than have been raised against it, the law would still have protected it; and nothing short of the special interposition of the Legislature was capable of invalidating it. The Act passed to bastardize the children of Lady de Roos expressly mentions that the said Lady Ann had left her husband's house, and lived in notorious adultery, and had been delivered of three male children, which children thus notoriously begotten in open adultery, 'by the laws of this realm are or may be accounted legitimate,' &c. Who can say, in opposition to such a declaration of the law in an Act of Parliament, that Nicholas, who was born when his mother, far from having abandoned her husband, was living upon the most affectionate terms with him, ought to be accounted illegitimate? Indeed, the very Bill which was read to bastardize Nicholas recites, that he was born under circumstances that make him legitimate; a recital which is fully confirmed by the recitals in former Acts of a similar description, and by the authority of every case in which, either before or since, the same question has been brought under the consideration of a legal tribunal.

"I admit that the presumption of access may be combated by proof of impotency; but what evidence is there of Lord Banbury having been impotent? There is no statute of limitations on the powers and faculties of man. Instances of robust longevity might be cited still more extraordinary; Sir Stephen Fox married at the age of seventy-seven, and had four children; the

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first child was born when the father was seventy-eight, the second and third were twins, in the following year, and the fourth was born when the father was eighty-one. The Earl of Ilchester and Lord Holland can vouch for the accuracy of this statement, and I believe their genealogy has stood hitherto unquestioned[1]. Parr[2] became a father when even his son was of a more advanced age than Lord Banbury. Moreover his Lordship seems to have kept all his faculties both of body and mind in full exercise. Not only does it appear, from the evidence of one of the witnesses, that he went out hawking up to his death; but the Journals of the House furnish us with the best evidence of his attention to more important matters. There are several entries about 1627 of excuses for the absence of Peers, but Lord Banbury's name does not occur amongst them; and when the practice of noting Peers who were present, by prefixing the letter ς to their names, was resumed in

[1] *See* also the instance mentioned in p. 347, antea. "The parish register of Camberwell has the following entry:—1658, Rose, wife of William Hathaway, was buried 5th May, aged 103, who bore a son at the age of sixty-three.—Lysons' Environs of London, Vol. I. p. 11."—*Le Marchant*, p. 474.

[2] "Thomas Parr.—He was born in 1483, and did not marry until 1563. He had a son and daughter who both died very young. 'In 1588, when he was 105 years old, he did penance for lying with Catherine Milton, and getting her with child.' His wife having died in 1605, he married in his 122nd year Jane, widow of John Lloyd, and lived thirty years longer. The fullest life of him is in the Encyclopædia Britannica, article Parr; it contains the most interesting part of the tract by Taylor in the Harleian Miscellany. Granger mentions a print of Parr sitting in a great chair, with a bolster behind him, his eyes half open, with the following inscription, 'The old, old, very old man, or Thomas Parr, the son of John Parr, of Wennington, in the parish of Alderbury, in Shropshire, who was born in 1483, in the reign of Edward IV., and is now living in the Strand, being 152 years and odd months.'—1635. This print must have been taken when Parr was living under Lord Arundel's protection, who had brought him up to court for the King's amusement. His Lordship, as is well known, was a great lover of antiquities."—*Ibid.*

"Henry Jenkins, of whom there is an entertaining account in Mr. Gilpin's Northern Tour, is said to have lived to the surprising age of 169. *Vide* Granger, Vol. II. p. 112. It does not, however, appear that he had any children."—*Ibid.*

1628-9, I find that the Earl of Banbury is so distinguished on the 21st of January, and appointed on a Committee for the Bill to preserve His Majesty's revenue. On the 20th of February he is appointed on a Committee for the defence of the kingdom, and he appears to have been in his place on every other day during the session, except once or twice, when his absence is accounted for by sickness[1]. The Parliament was dissolved on the 10th of March, and no other called for twelve years[2]; in the meantime he died.

" I shall not travel through the various acts of Lord Banbury's life, from which it has been inferred that the birth of these children was concealed from him. The instances of human caprice and infatuation that pass daily before our eyes, lead me to regard this conclusion as more specious than correct. It is an abuse of reasoning to apply it to such a case as this, for we are not to infer that certain acts were done because they ought to have been done. We must observe also, that the acts of Lord Banbury all prove that his fondness for his wife, and his intercourse with her, continued up to the hour of his death. If they lead to an inference of non-access in one view, they destroy it in the other. The concealment of Lady Banbury's pregnancy is perfectly consistent with the existence of the access, and even of the sexual intercourse. One fact however has been overlooked, which somewhat relieves her Ladyship from this imputation. She appeared, along with Lord Banbury, in open court, for the purpose of levying a fine of Caversham, only a few months before the birth of Nicholas[3], when her pregnancy could scarcely have been overlooked by her husband[4].

[1] *Lords' Journals*, vol. IV. p. 43.

[2] Lord Banbury was present on the 10th of March, 4 Car. I., 1628-9, on which day Parliament was dissolved. He must then have been about *eighty-two* years of age.

[3] 23rd of December 1629.

[4] The fine of Caversham was levied on the 23rd of December 1629; and

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" I do not attach much weight to either of the Inquisitions; they were exparte proceedings in an inferior court, liable to be quashed or superseded at any subsequent time. There[1] are instances of a series of Inquisitions alternately establishing and controverting the same fact; and no one can examine the records, without being satisfied that they constitute evidence of a very secondary description, which has deservedly fallen into disrepute.

" The evidence received by the Committee in 1661 has been treated by some of the noble Lords with great severity. Due allowance has not been made for the imperfect state in which it has come down to us. Neither the questions nor the answers are fully reported; for instance, Ann Delavall is reported to say, that 'she knoweth him to be the son of William Earl of Banbury, being present at his birth;' and in a subsequent answer to the question, whether Earl William saw the child, she says, 'I was not there to know it.' Now it is evident, that the first answer referred to the birth of Edward, and not of Nicholas. She was probably interrogated respecting both the children in the order of their birth. If she had referred to Nicholas instead of William it would have been unnecessary to say Nicholas Earl of Banbury, in her answer to the second question;—she would have said 'him,' as she does in her answer to the first question. I may add, that the word 'Edward' is at the end of the line which precedes her examination, as if he was the subject of her examination. With this key the whole of the evidence is consistent and satisfactory. The woman had been present at the birth of the eldest son, and her connexion with

Lord Erskine considered that Nicholas was born in January 1630, instead of 1631: but his argument was not affected by the mistake, because the Earl and Countess levied a fine of the manor of Cholcey in November 1630, about six weeks only before the birth of Nicholas.

[1] *Vide* a note at the end of the volume.

the family being altered before the birth of his brother, she only knew of the birth of the latter by report, though she could speak positively of his being regarded by Lord Banbury as his child. Mary Ogden was his nurse for fifteen months, but it does not appear from how soon after his birth. She does not know whether Lord Banbury ever saw him. But when it is considered that we are ignorant whether she was his wet-nurse, and whether Lady Banbury might not have been jealous of her interference, it would be bold to presume that Lord Banbury *could* not have seen the child without her knowledge. The evidence of Ann Read requires large interpolations to make it intelligible. The last two answers are obviously in the wrong order. Edward Wilkinson was called to speak to the facts subsequent to Lord Banbury's decease, and having never known Nicholas until that time, there is nothing extraordinary in his ignorance, whether Lord Banbury knew that he left any issue. I really cannot partake of the scepticism which has been expressed by some noble Lords respecting this evidence, and I am confident that had the whole of it been preserved, their impression would have been very different. The facts deposed are conclusive, unless you impeach the veracity of the witnesses. The cohabitation of Lord and Lady Banbury, the birth of the child, his recognition by Lord Banbury, are all fully established. The counsel might safely say, as they did, that they had cleared the title. It is true Lady Salisbury was not called, but she was summoned, and her absence cannot be construed into an imputation against the title of Nicholas, as her husband was his next friend in the suit instituted in Chancery, for perpetuating the evidence in his favour. The servants were more likely to know what passed in the family upon such an occasion, than persons of a higher station; and it argues no

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small confidence in his cause, that the claimant should bring them forward. The questions addressed to these witnesses came from the Attorney-general, and it was his duty to elicit the truth, and to present it to the House in such a shape, as to admit of no misconstructions. An examination conducted under his auspices, ought to be regarded strictly, and no facts should be established by way of inference, when they might have appeared on the face of the examination itself. If the House wanted further evidence, why did they not call for it, for they had the power and opportunity of doing so? More than twenty individuals were then alive, competent to prove what was the general reputation in the family, and in the world. The register of baptism, indeed, never existed, as Lady Banbury was a Catholic[1], and her child was probably christened in private, by a priest of her own persuasion.

"I do not mean to contend for the immaculate virtue of Lady Banbury. She may have sinned with Lord Vaux and fifty other Lords; but if her intrigues were carried on at the time she cohabited with her husband, the legitimacy of her child is unblemished. She evidently was a very imprudent woman; and scandal may have been busy with her fame, both before and after Lord Banbury's decease. Her early marriage with Lord Vaux must have deeply prejudiced her son in public estimation, and it may have deterred him from taking those steps for the recovery of his property, which would obviously have been beneficial to him[2]. Lady Banbury had certainly never been convicted of an adulterous intercourse with Lord Vaux, and she might have dreaded an

[1] *Vide* pp. 320, 321, antea.

[2] Lord Erskine did not allude to the reasons which exist for believing that the alienation of the property was then considered to bar the issue of Lord Banbury. *Vide* p. 375 *et seq.*, antea.

exposure, which would have deprived her of her station in society. The provision made by Lord Vaux for Nicholas must have been an additional consideration for his abstaining from a step, which would probably have been fatal to the peace of that nobleman, as well as of Lady Banbury. It must not be overlooked, that so far was Nicholas from being in affluent circumstances, he was a very distressed man.

" These are not the only parts of the conduct of Nicholas which have been brought forward by the adversaries of the claim. He has been traced from his cradle to his grave, and every period of his life has been scrutinized, in order to procure evidence of his illegitimacy. The dim twilight of two centuries has gathered round the events of his obscure career, and prevents us from forming a correct estimate of either their intrinsic or relative importance. If, indeed, we could transport ourselves to the troubled times in which he lived, we might venture to draw inferences from the vicissitudes of his domestic history; but it is now become a most fallacious experiment. Why is the bounty of Lord Vaux to his step-son to be ascribed to another motive, than what belonged to such a relationship? Why is it to be assumed that he has repudiated the title of Banbury [1], because he had been called in his earliest childhood by the name of Vaux? Why should it not, with equal justice, be assumed that his legitimacy was fully acknowledged, because in the licence to travel given to his mother by the Protector, the terms are, ' to Lady Banbury and her son,' the natural description of a widow and her infant; and because, in the leave of absence granted to Nicholas by the House, as well as in the Act passed for the sale of Boughton Latimer, Nicholas is mentioned as Earl of Banbury; and on various trials of property in which he was con-

[1] It has been proved that he assumed the title of " Banbury " as soon as he was entitled to do so.

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cerned he always received the same title [1]? These are weak arms to encounter a presumption so strong as that which exists in favour of legitimacy. It would have been most unjust, upon such slight grounds, to pass a special Act to bastardize the child; and attempts of this description have failed when they were much better supported. One case occurred highly encouraging to him in the very Parliament to which he submitted his claim [2]; and there can be no doubt that the Act introduced to bastardize him was withdrawn upon the first reading, from the disapprobation naturally excited by so harsh and unjust an exercise of power.

"I trust, my Lords, that I have established that the opinion of the Law entertained by the Committee in 1661 was well founded, and that Nicholas, the original claimant, ought to have been admitted to the full enjoyment of the privileges of this Earldom. The same rights have descended to the present petitioner, and I trust they will be recognised by your Lordships."

Lord Eldon.

Lord Eldon, C.:—"This question, like every other that comes before the House, ought to be decided with impartiality. We sit here as Judges, and any resolution we may make under the influence of feelings for the respectability of the claimant, would be fraught with the deepest mischief. Such a resolution would be wholly inconsistent with the duty which we owe to the House and the public. We are bound to look at the facts of this case with the eyes of the Law, and if we cannot, with those eyes, discern that Nicholas Vaux was legitimate, we must conclude that the Law does not authorize us to determine that he was so.

"Upon an accurate review of the evidence, it would seem that from the death of the Earl of Banbury in 1632

[1] "*Earl of Banbury* v. *Wood*, 1 Salk. 4, &c."; *Le Marchant*, p. 483.

[2] Barony of Fitz Walter. *Vide* antea, p. 64.

until 1661, nothing had transpired to make it probable that Nicholas Vaux had a right to the Earldom[1]. Your Lordships must therefore place yourselves as if you stood in this House in 1661. Had we then been called upon for our opinion, I think that it would have been impossible for any of us to have declared Nicholas to be the son of the Earl of Banbury. If we revert to the year 1606, we find Lord Banbury having brothers and sisters, nephews and nieces. He marries in that year, and his settlement demonstrates his anxious desire to secure the perpetuity of his family, or, to use his own words, 'the continuance of his manors, &c. in his name and blood.' His estates are limited, after failure of his heirs male by his wife, to the use of the heirs male of the body of Sir Francis, his father, who, it appears by a previous Inquisition, had settled the same property 'to descend in the name and blood of Knollys.'

"Lord Banbury's property was almost wholly in land. His Caversham estate was left in his power by the settlement. He could cut off the entail, but his wife could not. Rotherfield Greys had been the gift of the Crown for services rendered in a former reign, and was consequently inalienable: the entail could not be barred. It is thus manifest that the tenure of these estates made the birth of male issue a matter of the highest importance to Lord Banbury.

"In the year 1630 Lord Banbury makes an absolute gift of Caversham to his wife, and by another instrument he conveys Rotherfield Greys to his nephew, who, in default of his having issue, was his heir male. It is almost needless to observe that the latter instrument would have been wholly inoperative against his sons[2].

[1] As Nicholas, whom Lord Eldon, like Lord Ellenborough, styles "Nicholas *Vaux*," was born during the coverture of his mother, he had at least a *prima facie* right to the Earldom after his brother's death.

[2] It must be again observed, that a contrary impression certainly pre-

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" In the year 1628 King Charles sent a message to the Lords, requesting them to admit the Precedency which had been granted to the Earl of Banbury by patent, *as he was old and childless*: the House assented [1]; and the Earl concurred in this representation by taking his seat shortly afterwards [2].

" The Earl did not long enjoy his honours: he died in 1632, and by his will he bequeaths his property to his wife, *without noticing any issue.*

" The birth of the children, whose legitimacy is now the subject of discussion, is prior to the disposition made by Lord Banbury of his property, prior to the King's message, prior to Lord Banbury's will [3]. Is it possible to believe that any of these instruments would have been executed, or that the King's message would have been sent, if Lord Banbury had known that he was a father? Is it possible to infer from any part of his conduct that he was aware that he had any issue? His concurrence in the King's message would have been a fraud of the deepest die. His disposition of his property would have been unprincipled. The heart of a parent naturally yearns towards his children. Not so with Lord Banbury, if these were his children. He sinks into the grave, having industriously stripped his supposed issue of all those estates, to which, under the most solemn settle-

vailed. *See* the remarks on the settlement of Rotherfield Greys on Sir Robert Knollys, antea.

[1] But the House did not assent without stipulating that the Precedency should not be enjoyed by *his heirs*, a proviso which would be unnecessary if he were, or was expected from his age or infirmities to continue, childless.

[2] The Earl's concurrence is only *inferred*; and as he was no party to the King's message, and was a very old man, he probably accepted the seat assigned to him on the termination of the controversy, which was between the *King* and the *House*, and *not between* the *House* and *himself*, without having taken an active part or feeling much personal interest in the question. *Vide* antea.

[3] Nicholas, the claimant's ancestor, *was not born* until *after* the disposition of Lord Banbury's property, nor until *after* the King's message, nor until *after* Lord Banbury made his will.

ments, they would have been entitled. And this is the act of a man who has a high hereditary honour to transmit to posterity [1].

" No sooner had Lord Banbury descended into his grave, than his widow stepped into the bed of Lord Vaux; she became that nobleman's wife on the very day that she proved her deceased husband's will. An Inquisition is held, which finds Lord Banbury to have died childless, and designates his heirs. The Countess must have been privy to the Inquisition, for the jurors find her living at Caversham [2]: some of the deeds to which they had recourse were necessarily in her custody; the others must have been produced, for the Crown, on whose behalf the Inquisition was made, could draw out of the hands of parties all deeds affecting the interests of the Crown. If Edward and Nicholas had been legitimate, she would not have abstained from producing them on such an occasion : protected by her second husband, she might boldly have avowed their birth, and claimed their birthright. And if she had chosen to be silent, where were all the great connexions of these children ? Where were the Howards and the Knollyses ? Surely amongst these noble families some one would have come forward to advocate their cause ! Inquiry into their title could not have been stifled [3]. I cannot consider this Inquisition to be invalidated by the Inquisition held in 17 Charles I.

[1] *See* the observations on these points, antea.

[2] The inquisition was held at Burford, in Oxfordshire, which is several miles from Caversham; and there is nothing to prove that the Countess was privy to it.

[3] There is undoubtedly much cogency in these observations; but there are, nevertheless, various circumstances by which the facts might be explained. Conceding, however, for a moment that the Countess acted upon the belief that Lord Banbury was not the father of her children, or from a desire to affiliate them to Lord Vaux, neither her belief, nor her conduct could, as the Law then stood, *affect their legal status*. Even a mother's direct evidence that her children were not begotten by her husband would be insufficient for that purpose.

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The latter proceedings bear every mark of collusion. They differ from the former by making Lord Banbury die in London, instead of Caversham, and contain a very scanty account of his property. No reference is made to any undue disposal of his various possessions. No notice is taken of the first Inquisition, though the finding is so inconsistent with it. If an Inquisition be directed in one county, and afterwards held in another, the main finding must be the same as to any issue left by the parties; one Inquisition cannot in this respect contradict the other, without showing strong grounds for such contradiction [1].

"The miserable scraps of evidence of the witnesses in 1661, show the weakness of the claim. They disprove both the access of the parents, and the recognition of the children by the parents [2]. No one can doubt that, if either of these facts were capable of being established, a multitude of witnesses would have come forward. The evidence of repute would never have been allowed to rest on the veracity of such obscure individuals, when there were six relations nearly allied to the claimant

[1] These Inquisitions have been before discussed; and it is difficult to understand where the "marks of collusion" are to be found in the second Inquisition of the 17th Car. I. That Inquisition differs certainly as to the place of the Earl's death from the former one, but if, as there is reason to believe, the statement in the *second* Inquisition is correct, that fact is strongly in favour of its authenticity, and detracts from the value of the first Inquisition, the existence of one error being a just cause to infer the existence of others. The property which it mentions was all the Earl held in the county to which the Inquisition related, and there are no examples of references to former proceedings in another county in such instruments. Inquisitions held in different counties often differ most materially as to the heirs of the deceased, and the case of *Cornwall*, before cited (p. 66), is precisely in point, for an individual was found by one inquest to have died without issue male, and in another to have left a son and heir twelve years of age, which child afterwards succeeded to the inheritance. *Vide* the note at the end.

[2] A careful examination of that evidence justifies the idea that there must be an error, probably of the press or manuscript, in this part of Lord Eldon's judgment, because, unless those witnesses committed gross perjury, both *access* and *recognition were distinctly proved*. *Vide* antea, p. 330.

(presuming him to be legitimate), among them three maternal uncles, then in the House[1]. The House conducted the inquiry under a correct notion of the Law, for a number of questions were put to the witnesses, which would have been wholly unnecessary, if Lord Coke's doctrine had been well founded. This extensive inquiry would have been supererogatory. They would have had nothing to do, but to require proof of the marriage, and of the parents being within the four seas, before the birth of the children. We see that they did more, and we cannot doubt what would have been the result of their inquiry, if the Attorney-general had not misled them by an erroneous statement of the Law.

"The Attorney-general[2] was a man of eminence in his profession, yet, in this instance, he was clearly wrong[3], and I am satisfied that, if the House can convince itself that Nicholas was not *de facto* the son of the Earl of Banbury, it will have no difficulty in determining that he was not so *de jure*. If there is any rule of Law that compels you to declare Nicholas to be legitimate, you must conform to that rule, even if your conviction should be, that the rule of Law may be against the truth of the fact[4]; but if there be no such rule, and

[1] As the Committee in 1661 was satisfied, upon the evidence produced, that the claimant was *de jure* legitimate, it would have been an act of supererogation to produce *other* witnesses. Lady Salisbury, the wife of one of the Peers alluded to, and the claimant's maternal aunt, was sworn on his behalf, but was not examined.

[2] Sir Geoffrey Palmer.

[3] It appears that Lord Eldon, as well as Lord Redesdale, considered that Lord Coke's definition of the Law was erroneous. Lord Ellenborough however admitted, in one place, that it was correct. A reference to the authorities which have been collected will probably produce conviction, that both Lord Coke and the Attorney-general, in 1661, *were not* mistaken. *Vide* antea. The inquiries of the House certainly bore upon the *de facto* paternity, and they were so far unnecessary; but they might have been made to counteract the feeling which prevailed in the minds of some of the Peers, that the claimant was not *actually* the son of Lord Banbury.

[4] This passage is most important, as it describes precisely the grounds upon which the claim rested. It was founded upon a rule of Law which pre-

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the Law allows you to inquire by attending to evidence, then you must carefully examine that evidence, and determine as it shall authorize and require you to determine. If the positive rule of Law is that Nicholas must be legitimate, because the Earl and his wife were living when he was born, then there is an end of the question, when it is proved that they were living when he was born: but if the rule of Law be not such, and evidence can be received to affect the inference that he was legitimate because the Earl and his wife were then living, the question will be, whether the rule will let in evidence, and such evidence as is produced in this case; and what is the effect of that evidence?

"The passage in Lord Coke must be considered with reference to the authorities by which it is supported. We find from Bracton and Fleta, that the doctrine of the parents being within the four seas did not, even in those times, establish the presumption of the legitimacy of a child of the female parent, so as to exclude all evidence against the presumption. The legitimacy of the child might be questioned in case of the husband's having been so absent from his wife, or of his labouring under any disorder, so that it was impossible for him to be the father. These facts, too, might be looked at concurrently with the wife's adultery, and the non-recognition of the offspring as his, by the husband[1].

vailed for many centuries, and from which rule Nicholas derived his legal status. If he was legitimate under that principle of Law, he could only be rendered illegitimate by an Act of Parliament; and his legitimacy ought not to be affected by *variations* made in that Law, *eighty years after his birth*, above *forty years after* the Committees *reported in his favour*, and *twenty years after his death*. The existence of the rule of Law alluded to has, it is confidently presumed, been established by the authorities referred to.

[1] The principles of Law, laid down in Bracton and the Fleta, were mainly derived from the *Civil* Law; but a reference to their works will show that even those writers did not admit the possibility of bastardizing a child born in wedlock, if the husband *could* have been the father, and that the presumption in favour of legitimacy could only be rebutted by evidence of *impossibility*. *Vide* antea.

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Foxcroft's case (10th Edward I.) shows that it was not the partial or permanent impotency of the husband, but the impossibility of his being the father, which was the subject of consideration. In that instance he was an old bedridden man, and the child was born twelve weeks after marriage. It was held illegitimate[1]. There are cases also where a man cannot come to his wife, that implying another kind of impossibility[2]. Lord Hale, who was the most learned black letter lawyer that perhaps ever existed, must have been familiar with these authorities, as well as with the opinion of Coke, and he has laid down the law, conformably with my construction of it[3]. He decided (in *Hospell* v. *Collins*) that the issue for the jury was as to the *fact of access*, or, as I understand him to mean, *sexual intercourse*. For the access in question is of a peculiar nature; not being access in the ordinary acceptation of the word, but access between a husband and wife, viewed with reference to its result, viz. the procreation of the children. It is true that the proof of access of another sort is a ground for inferring sexual intercourse, but the inference is only a highly probable and strong one. A jury (and your Lordships here perform the functions of a jury)

[1] It has been shown that *Foxcroft*'s case was *entirely mistaken*. The issue was declared illegitimate, because the *marriage* was *invalid*. *Vide* p. 30, antea, and the Appendix.

[2] "43rd Edw. III. 7th Hen. IV. 9."—*Le Marchant*. The case in the 43rd Edw. III. (*vide* p. 45, antea) established, that if a married woman eloped from her husband, and has a child by an adulterer, such child was a *bastard* by the *Ecclesiastical*, but *mulier* by the *Common* Law, *if the husband were within the four seas*, "so that he might come to his wife," a remark which explains the principle upon which the doctrine of the four seas was founded. In the case in the 7th Hen. IV. the same doctrine was stated in the strongest terms. *Vide* antea, p. 48.

[3] There is no proof that Lord Hale ever laid down the law to the effect here stated. The facts of the case of *Hospell* v. *Collins* are very doubtful, as the case is not reported, and there are the strongest reasons for believing that Lord Hale's view of the law on the subject perfectly coincided with that of Lord Coke. *Vide* antea, p. 122, where the point is examined.

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ought to be told, that where the husband and wife have had the opportunity of sexual intercourse, a very strong presumption arises that it must have taken place, and that the child in question is its fruit; but it and your Lordships ought also to be told, that this is but a very strong presumption, and no more; that a strong presumption may be rebutted by evidence, and that it is the duty of a jury and your Lordships to weigh the evidence against the presumption, and to decide according as, in the exercise of free and honest judgment, either may appear to preponderate[1]. It is necessary, however, to consider what evidence is admissible to rebut this presumption. This is a question of some nicety and deserving of the utmost attention your Lordships can give to it.

" Your Lordships are aware that many facts, which become the subjects of judicial inquiry, are facts done in secret, facts done at a moment selected more especially, because there is no eye-witness present. Of this nature are almost all crimes, and indeed many actions which are not criminal. In all such cases the Law, perceiving the impossibility of obtaining direct evidence, contents itself with indirect or circumstantial evidence.

" Your Lordships well know that circumstantial evidence is nothing more than evidence of those circumstances which usually accompany facts, from the proved existence of which circumstances, both law and reason infer the existence of the facts themselves. A murder is committed—nobody saw the deed done, but many

[1] It is submitted that this dictum was founded on the Law after the rule of " the four seas " was exploded, and that it is at variance with the law, at the time when the claimant's ancestor was born, and when the claim was first brought forward. In the case of *Shelley* in 1806, Lord *Eldon himself* said, " *Formerly access was presumed, if the parties were within the narrow seas, though there was no doubt of the contrary.* Since that time, access or non-access must be proved like any other fact," &c. *Vide* pp. 247, 248, antea.

persons saw, or were acquainted with several circumstances, constituting what is called circumstantial evidence ; these persons give their evidence, and from that evidence, law and reason deduce a conclusion respecting the fact really in issue, namely, whether the prisoner did or did not murder the deceased.

" Here the question for the jury, formed as it were by your Lordships, is, had the Earl and Countess of Banbury sexual intercourse at such time as that, in the course of nature, Nicholas Knollys could have been the fruit of that intercourse? Here, as in the case of the murder, your Lordships cannot have direct evidence: from the very nature of the case (independently of the length of time which has elapsed), it is impossible your Lordships can have direct evidence, as by the testimony of witnesses speaking directly to the fact; then I say your Lordships may hear, and are bound to hear, circumstantial evidence[1].

" Evidence of the conduct of the supposed parents of the child appears to me to be admissible evidence upon this question.

" My Lords, when two women each claimed a particular child as hers, and called upon a person to decide between them, he ordered that the child should be severed into two parts, and that each take half. The

[1] The strong *legal presumption* in favour of legitimacy is not noticed. In the case of a murder, the fact may be proved by circumstantial as well as by direct evidence; but in the case of disputed legitimacy of a child born in wedlock, the rule of the Courts anciently was to require *direct* and *conclusive proof* of one of three matters of *fact*; viz. impotency, divorce, or non-access; and even so lately as the *King* v. *Luffe*, the Court laid it down as an inflexible principle, that a child born in wedlock could only be bastardized by evidence of *physical* or *moral* IMPOSSIBILITY. In no instance, except by the declarations of the husband and wife, which are not admissible, can sexual intercourse be *proved* by direct evidence. The Law, therefore, *presumes* it to have taken place, if the parties lived together, and were capable of procreation; and this presumption could only be rebutted, except in cases of divorce, by *conclusive* proof of *impossibility*, arising either from absence from each other, or from impotency.

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true mother instantly waived her claim: and he decided upon that, that the child was hers. What is the lesson which this story teaches? Not perhaps that mere declarations are evidence in such a case, for such declarations may be made for a temporary purpose—in that case both women made declarations, and one of course made false declarations,—but it teaches that the conduct of a parent, the feelings of a parent—those feelings being inferred from such conduct—afford us some evidence, assisting us in arriving at a right conclusion as to the matter in controversy.

"It has been argued at the bar that mere declarations of parents on such subjects are not admissible evidence to affect a question of legitimacy—and that conduct is precisely the same thing: that it is substantially nothing more than a declaration; that it is only a declaration by deed, instead of by word. I will not say that all simple declarations are evidence in such a case, but I will say that the conduct of a husband and wife, towards a person claiming to be their legitimate child, is in some cases admissible evidence upon the question whether the husband and wife had sexual intercourse at such time, as, by the course of nature, that child might have been the fruit of that intercourse. It is often a most material species of evidence. It is not always, but it is frequently a safe ground for inference, for it comes from the least suspicious source, that is, from the very individuals who are the most interested to give a different testimony. If there ever was a case where circumstantial evidence of this description is admissible, it is this.

"Such I conceive to have been the Law, when Nicholas Vaux presented his petition to Charles II.; and the cases which have since been decided establish the principle I have just laid down so unequivocally, that I am astonished to hear it disputed. (Here his Lordship reviewed at some length the cases of *Pendrell* v. *Pendrell*,

St. Andrew's v. *St Bride, Lomax* v. *Holmedon, King* v. *Luffe, Goodright* v. *Saul*[1].) This principle is founded on reason as well as on law: there is no absurdity into which we might not be led by adopting the doctrine of Lord Coke[2]. There was a case lately before us on a divorce Bill: I allude to Lord Gardner's. Can it be doubted, that if the son of Lady Gardner should appear before your Lordships in a question of legitimacy, whether he would or would not be determined to be illegitimate[3]?

"I have hitherto inferred the illegitimacy of Nicholas from the conduct of Lord and Lady Banbury: my inference is confirmed by all the other facts of the case.

"Nicholas brought no ejectment for Rotherfield Greys[4]. The son of Lord Banbury was entitled by the patent to an annuity payable out of the Exchequer. Nicholas never claimed this annuity[5]: in short, he avoided all proceedings in which the Crown was immediately interested, for the truth must have then come out. He never possessed the undisturbed enjoyment of his title. He walked into the House asserting that he was Earl of Banbury, but he had not been there three days before there was an arraignment of his right[6].

[1] Every one of the cases here cited occurred long after the time of Charles the Second.

[2] It has, it is presumed, been proved that it was *not only* "the *doctrine* of *Lord Coke*," but the *universally received rule of Law* when Lord Coke wrote; and that it had been the rule of Law for centuries before, as well as and for nearly a hundred years after, Lord Coke lived.

[3] "This case was brought before the House in 1824, and his Lordship's prediction was verified. The child of Lady Gardner was declared illegitimate."—*Le Marchant.*

[4] *Vide* antea.

[5] As the House of Lords, and the Crown, refused to recognise his right to the Earldom, it was highly improbable he should try his right, in an inferior Court, to that which was *incidental* to the *Earldom*.

[6] But he was permitted to remain in the House, and to exercise all the functions of a Peer for many months after his right was questioned; and no farther proceedings were adopted against him for the remainder of that session.

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" Charles Knollys petitioned in 1692 to be tried as a Peer. If he was a Peer, he had a right to be so tried; and it was a regular proceeding, nay, it was the duty of the House to inquire into the merits of his petition. They entered into the necessary inquiry, which led them to a resolution to dismiss the petition. The indictment pending against the petitioner having been removed into the Court of King's Bench by certiorari, he pleaded a misnomer in abatement. To this plea Sir John Somers, then Attorney-general, replied that the petitioner ought to answer to the indictment, for that the House had resolved that he had no right to the Earldom. To this replication the petitioner demurred, and Sir Edward Ward, who in the mean time had become Attorney-general, seems to have joined in the demurrer. Lord Holt and another of the Judges [1] were of opinion that the replication did not avoid the plea, inasmuch as this judgment of the House, whether true or false, was not such a judgment, as, by the law of the land, they were bound to recognise as a bar to the plea. They quashed the indictment, not so much on the original question of right or no right to the Peerage, but upon the insufficiency in their opinion of the replication, which seemed to proceed upon a supposed original jurisdiction of the House in matters of Peerage. This left the question of legitimacy precisely in the situation in which it had stood before the investigation, and the present claimant cannot take the least advantage from the proceedings in the King's Bench, which quashed the indictment in that plea [2]. It has been said that the resolutions of the House on the petition were extra-judicial, as the object of the petitioner's not being to establish the legitimacy of Nicholas, the House

[1] The Judges of the Court of King's Bench were *unanimous*.

[2] All the advantage which the claimant derived from those proceedings was, that they left the question of legitimacy where it stood in 1661, when the Committees for Privileges reported in favour of it.

had nothing to do with it. I think differently. If a Scotch Peer should claim to vote as one of the Scotch Peers, or an Irish Peer as one of the twenty-eight, and we thought his title so to vote doubtful, we must necessarily investigate his qualifications. We must inquire whether or not he is a Peer, before we can determine whether or not he is entitled to vote. So far, and so far only, the House entered into the question of the legitimacy of Nicholas.

"The Report of Lord Hardwicke is most important. One must perceive plainly from it, that he would not have subscribed to the doctrine of Lord Coke [1]. It was probably made with the full concurrence of the law authorities of the day, and I cannot cite more illustrious names. Lord King was Lord Chancellor, Lord Raymond Chief Justice of the King's Bench, Sir Joseph Jekyl Master of the Rolls, and Charles Talbot Solicitor-general. No one who is acquainted with public business can suppose that such men could be ignorant of a proceeding of this description, involving as it did so important a doctrine of Law. And they must have understood the ultimate opinion of the House to be, that the legitimacy or illegitimacy might be proved by circumstances alone, in contradiction to the doctrine of Lord Coke [2].

[1] The Report alluded to merely recites the history of the claim, but it does not contain the slightest allusion to Lord Hardwicke's own opinion of the doctrine of Lord Coke, or of the legal right of the claimant's ancestor in 1661. It may, however, be inferred that he concurred in the opinion expressed by the House, that the resolution of 1693 was a judgment and conclusive. *Vide* p. 433, antea.

[2] It must, however, be observed that the law authorities contemporary with Lord Hardwicke, as well as that eminent lawyer himself, formed their opinions as the Law was *then* understood; and an important variation had taken place between 1661 and 1727; but, as has been just remarked, Lord Hardwicke did not state any opinion respecting the legitimacy of the claimant's ancestor.

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Lord Eldon.

" To sum up these circumstances, Lord Banbury was a person of the highest station: the relations of himself and his wife were also persons of the highest consideration: a child was born of the body of his wife in his extreme old age, after twenty-one years unfruitful cohabitation [1]: the place of its birth, baptism and nurture; its general treatment from the day of its birth to that of its death, concealed. The conduct of Lord Banbury towards the child shows that he was either ignorant of its existence, or capable of gratuitously imposing on the King, the House, and the country. Finally, we shall have to account for his stripping his innocent offspring, and his hereditary dignity, of the wealth, which he had always been so anxious to preserve in his own blood and name. Thus far with respect to Edward, and if he was illegitimate, no one can contend for the claim of Nicholas. There are additional arguments against the latter. The place of his birth was Lord Vaux's house, his first name of reputation was the name of Vaux, his fortune was entirely derived from the bounty of Lord Vaux. He never claimed the estates annexed to the Earldom of Banbury, and he failed in establishing his claim to the title [2].

" I have struggled to arrive at a proper decision upon this question, and, had it come before me in the Court in which I have the honour to preside, I could have

[1] It has been before observed, that this was *not then proved*, and that it has been since shown that Lady Banbury had a child, if not children, before the birth of Edward in 1628.

[2] His legal right was *twice admitted* by the Committees for Privileges before whom it was tried, and the House was so fully convinced of his being entitled by Law, that a Bill was introduced purposely to disqualify him, upon the ground, that in *no other way could his right be defeated*. He failed, it is true, in obtaining a writ of summons; but if he was, as the Committees reported, and as the Bill itself stated, *de jure* the legitimate son of the first Earl, the Crown acted illegally in withholding the writ.

given no other judgment than that which I now state to the House—that Nicholas was not the legitimate son of William Earl of Banbury.

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"If those who now exercise the functions of royalty think proper to create this respectable gentleman (the claimant) a Peer, I know no reason against it, but for God's sake let not this House make Peers."

The Committee for Privileges, upon a division of twenty-one to thirteen[1], resolved to Report "That the Committee had met and considered the matter to them referred, and had heard counsel, as well on the behalf of the Petitioner, as also His Majesty's Attorney-general on behalf of the Crown, and examined witnesses, and had come to the following Resolution: 'Resolved, that 'it is the opinion of this Committee, that the Petitioner 'hath not made out his claim to the Title, Dignity and 'Honour of Earl of Banbury[2].'"

Report of the Committee.

This Report was presented to the House on the 11th of March 1813, and was ordered to be taken into consideration on the Monday following[3]. On that day, the 15th of March, "the order for taking into consideration the Report made from the Committee for Privileges being

Resolution of the House, 11th March 1813.

[1] Of the twenty-one Peers who formed the majority, it is said that "four were Spiritual Lords, *who had never attended the proceedings*; of the remaining seventeen, *ten only attended even occasionally*, and *more than one, never until the day on which they gave their vote*, though, in consequence of an understanding in an early stage of the proceedings, that those Peers alone were to vote who should regularly attend, *the whole thirteen comprising the minority had constantly done so.*" Colonel Knollys, the present claimant, has feelingly observed: "Death, since these proceedings took place, has been busy on both sides; but it seems to have moved with even accelerated step in that distinguished rank which included, as most impressed with the justice of the claim, among lawyers, the names of Erskine, Romilly, Perceval, and Hargrave, and some the most illustrious by their birth in the kingdom; and some there were, *absent* on the day of trial, whose places were occupied by strange faces assembled to give countenance to stranger opinions."—*Some Remarks on the Claim to the Earldom of Banbury* by the present Claimant, Lieutenant-Colonel Knollys, Scots Fusileer Guards: 8vo. 1835.

[2] *Lords' Journals*, vol. XLIX. p. 162. [3] *Ibid.*

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read, it was moved by the Duke of Norfolk, 'to agree 'with the Committee in the said Report,' which being objected to, the Question was put thereupon? It was resolved in the Affirmative. Then it was moved to resolve and adjudge 'That the Petitioner is not 'entitled to the Title, Honour and Dignity of 'Earl of Banbury,' which being objected to; the Question was put thereupon? It was resolved in the Affirmative[1]."

The Resolution of the House differed materially from the Report of the Committee for Privileges, which difference probably arose from the desire on the part of the opponents of the claim to prevent it from being ever again brought forward. The Committee for Privileges merely Reported that "the Petitioner had not made out his claim to the Earldom of Banbury," and if the House had adopted that Report, it would have been open to the claimant to agitate the matter again whenever he thought proper; but not satisfied with defeating the large minority who were in favour of the Petitioner's right, his opponents moved that the House should "*Resolve* and *Adjudge*," not as the Committee had Reported, that he "had *not made out his claim*," but that he was "*not entitled to the Dignity*." How far this Resolution is a conclusive Judgment, and whether it does or does not bar the heir of the Petitioner from prosecuting his claim, are grave constitutional questions which will not be here discussed. Lord Erskine immediately expressed the intention of recording his dissent from the Resolution of the House; and the following forcible and eloquent Protest, which was drawn up by his Lordship[2], was entered on

[1] *Lords' Journals*, vol. XLIX. p. 174.

[2] Upon this Protest, Lord Erskine observed, in a letter to General Knollys, the late claimant, dated on the 21st of July 1813:

"The Protest gives them *every fact*, and *all their arguments, but giving them both, leaves them without a single voice in Westminster Hall, from one end to the other.*"

the Lords' Journals [1]. Besides Lord Erskine, the Protest was signed by their Royal Highnesses the Dukes of Kent, Sussex, and Gloucester, and by seven other Peers.

THE PROTEST.

"DISSENTIENT,—

"Because it was satisfactorily proved before the Committee, that William Viscount Wallingford, Baron Knollys of Greys, was, in the third year of King Charles the First, by letters patent to him and the heirs male of his body, created Earl of Banbury, and that the Claimant was lineally descended from, and was the heir male of Nicholas Knollys, whose petition to King Charles the Second, that he might have a writ of summons to Parliament, as being son and heir of William, the first Earl, was referred to the Lords' Committees for Privileges, on the 6th day of June in the year 1661; and it was therefore admitted, that the only question before the Committee to determine was, Whether the said Nicholas was the son of the said Earl?

"Because, after the whole evidence had been given and duly considered, it appeared to the Committee, that the determination of this matter involved a question of Law, and that it was advisable to ask the opinion of the learned Judges on the subject, who on the 4th of July 1811, upon questions for that purpose having been proposed to them, delivered by the Lord Chief Justice of the Court of Common Pleas, the following unanimous answers:

"First, That in every case where a child was born in

On the 8th of November following, Lord Erskine thus wrote to General Knollys:

"I hope you will do me the justice to believe that the time which has elapsed since the decision against you in the House of Lords has had no tendency to diminish my sense of its gross and palpable injustice, nor to extinguish the wish that I must ever entertain, that the principles of that decision should receive their rebuke from public opinion, and we know from experience that there is no country in the world where public opinion is so triumphant as in England."

[1] Vol. XLIX. pp. 174—178.

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lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse was presumed to have taken place between the husband and wife, until that presumption was encountered by such evidence as proved to the satisfaction of those who were to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child.

" Secondly, That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, could only be legally resisted by evidence of such facts or circumstances as were sufficient to prove, to the satisfaction of those who were to decide the question, that no sexual intercourse did take place between the husband and wife at any time, when by such intercourse the husband could, by the laws of nature, be the father of such child: that where the legitimacy of a child in such a case was disputed, on the ground that the husband was not the father of such child, the question to be left to the jury was, whether the husband was the father of such child? and the evidence to prove he was not the father, must be of such facts and circumstances as were sufficient to prove to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when by such intercourse the husband could, by the laws of nature, be the father of such child; that the non-existence of sexual intercourse was generally expressed by the words 'non-access of the husband to the wife;' and that the Judges understood these expressions as applied to the present question, as meaning the same thing; because in one sense of the word access, the husband might be said to have access to his wife, as being in the same place, or in the same house, and yet under such circumstances as instead of proving, tended

to disprove, that any sexual intercourse took place between them.

" Because the foregoing answers throughout all the arguments leading to the final Report of the Committee, against which We now Protest, were considered as giving the rule by which the Committee ought to be guided; it being distinctly admitted that the question was not alone Whether it was more or less probable that the said Nicholas was in fact the son of William the first Earl of Banbury, but Whether upon the evidence before the Committee he ought *de jure* so to be considered, according to those rules and principles of judgment which would govern in the same case, the decision of a Court of Law.

" Because, in support of the proposition that Nicholas ought so to be considered by the Committee, it was satisfactorily proved by the Journals of the House collected and reported by the Committee itself in its preliminary proceedings, that he sat as Earl of Banbury in the Convention Parliament of Charles the Second, which assembled without Writ, and that on the 13th day of June 1660, during the sitting of that Parliament, on a question being made ' that a person, viz. the Earl of Banbury, sat as a Peer, who it was conceived, had no title,' the matter was ordered to be heard at the bar of the House on Monday the 23rd of July; on which day it sufficiently appeared by the Journals that the said Nicholas sitting as Earl of Banbury, was present, and was on that day named to be one of twenty-two Lords on a Committee then depending; yet that the objection to his title was not then heard, nor was there to be found any preceding entry in the Journal discharging the order, nor any adjournment of the consideration of the business, nor any entry of its being resumed during the session; and it further appeared that he sat as Earl of Banbury during the remainder of that Parliament

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without further question, although the House afterwards proceeded upon and decided the disputed barony of Sandys.

" Because it further appeared that no Writ was issued to summon the said Nicholas to the succeeding Parliament, because only of the question which had been so made and abandoned in the Parliament preceding.

" Because it was further satisfactorily proved by the Journals, that the said Nicholas did thereupon present his petition to King Charles the Second for his Writ of Summons, which was referred by his Majesty to the House, and by the House to the Lords' Committees for Privileges, who, after hearing counsel and witnesses, did, on the first day of July 1661, unanimously Report 'that Nicholas Earl of Banbury was a legitimate person'; and because it further appeared that after such Report, the petition was on the 9th day of July in the same year, again heard at the bar of the House, and that after hearing counsel on the part of the said Nicholas, and also Mr. Attorney-general, Mr. Serjeant Maynard, and Mr. Serjeant Glyn, on the part of the Crown, the consideration of the matter was again referred to the Lords' Committees for Privileges, who were of opinion to Report, and again unanimously Reported, 'that Nicholas Earl of Banbury, being in the eye of the law son to the late William Earl of Banbury, the House should therefore advise the King to send him a Writ to come to Parliament."

" Because it was the duty of the House to the King, as well as to the Claimant to have proceeded according to the forms and customs of Parliament, either to affirm or negative these decisions of the Committee for Privileges, more especially as the matter thus legally and formally referred to them by his Majesty was the petition of a person not only claiming to be a Peer, but who had

actually sat as one during the whole of the former Parliament; whose Writ had been withheld upon no other assigned ground than an unspecified objection before made and abandoned, and who had no other means of asserting the high inheritance of the Peerage, but by such Petition to the King thus referred to the House of Lords.

" Because the House in neglect of its manifest duty to the King, to the Claimant, and to the Public, deeply interested in the due administration of Justice every where, did nevertheless from time to time adjourn the consideration of the same until the 9th of December following, when without any resumed consideration, and without any notice to the Claimant, who was in possession of the decision of the Committee for Privileges, as a legitimate person, a Bill was suffered to be read a first time declaring him to be illegitimate.

" Because no reason appeared for such an unjust and unprecedented proceeding except a pretence at that time wholly unsupported by evidence, and no where even suggested, but by the preamble of the Bill itself, without a known author or mover, and which was suffered immediately to expire unsupported, viz. that the said Nicholas was not to be considered to be the son of William Earl of Banbury, but as the son of Lord Vaux of Harrowden, although it has appeared without contradiction when the witnesses were examined before the Lords' Committees for Privileges, and on all hands both then and now admitted, that he was born of the body of Elizabeth Countess of Banbury, during her coverture with William the first Earl, not being separated from her by sentence of divorce or otherwise, and although no evidence was given or attempted to be given that she had been living in Adultery, or had committed Adultery with Lord Vaux of Harrowden, or with any other person whatsoever.

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" Because such evidence so standing recorded on the Journals as having been given before the Lords' Committees for Privileges in 1661, and upon which they reported that Nicholas Earl of Banbury was a legitimate person, was by the Laws of this Land, as delivered to us by the mouths of the Judges, conclusive evidence of his legitimacy, until encountered by contrary proof; and that no such contrary proof was given or attempted; yet although the Attorney-General, representing the Crown, agreed that he was legitimate, although he was so unanimously Reported by the Lords' Committees for Privileges, and although nothing whatsoever appears to have been ever said in the House to question the propriety of such admission and judgment, still no Decision was given either negativing or affirming such Report.

" Because the Claimant having thus established a valid title in the opinion of the Public Officers representing the Crown, and of the Lords' Committees for Privileges who had reported in his favour, could take no further step, and was without all remedy, until it should be the pleasure of the House to proceed to judgment. It was not for him to consider the evidence he had produced as suspicious or unsatisfactory, when it had been accepted as sufficient; it was for the House only, if it differed from its Committee to have rejected its Report, or to have called for further proof in its support.

" Because the only attempt to explain and to justify so manifest a departure from all the forms and customs of Parliament was by alleging, that it evidently arose from a misunderstanding of the Law which then prevailed, viz. that Bastardy could not be established, even in the most notorious cases of Adultery, because the access or sexual intercourse of the husband was at that time an untraversable and conclusive presumption, if he was within the Four Seas during the natural period of gestation. This was argued to be the obvious foundation of the

Report of the Committee, and of the justifiable refusal of the House either to negative or affirm it: But against such justification, even if it were supported by positive proof, instead of resting upon unsupported presumption, We should equally Protest, since if at that time this doctrine (mistakenly or not) was so generally understood, that the ablest counsel for the Crown, and a Committee of the whole House, the supreme Court of Justice in the Kingdom, had accepted it as a Law, and considered themselves bound by it, no reason has been assigned for supposing that it must not at the very same period have equally been binding on the House itself; and in that case, it ought upon every principle of Justice to the Claimant, either to have affirmed the Report of the Committee upon the proofs before it, or proceeded upon further proof to bastardize him by Act of Parliament. In either mode of proceeding, the Claimant would have had the opportunity of supporting his title, if the evidence before the Committee was held to be suspicious or defective, and the Crown and the Lords would have had equal means of supporting the dignity and integrity of the Peerage, without the possibility of working injustice, when so many witnesses to the whole transaction were at that time living equally within the reach of the Claimant and the Crown. By their testimony, which must then have been clear, distinct and positive, he might either have been declared illegitimate, according to the rules of Law, or if the misunderstanding of those rules had extended from the Committee to the House, it might have passed the Bill before it for bastardizing the Claimant, instead of suffering it to expire unsupported; more especially, as it appears, by the evidence of contemporaneous Statutes, to have been a course frequently resorted to in those times; but, when neither of these courses were pursued by the House, when no ad-

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ditional evidence whatsoever was either produced or called for, when it came to no adverse decision, nor proposed any Statute, nor even put upon record any reason or principle of dissent from its Committee, We do most solemnly protest against all inferences or presumptions now upon that part of the case, except such as arise from facts recorded in the Journals of that period.

" Because it further appeared, that the House in this state of the proceedings, so far from considering the matter as concluded, or even dormant, did, upon the 26th of October 1669, of itself take notice ' That the Earl of Banbury's name was not in the list by which the Peers were called,' and ordered it to be referred to the Lords' Committees for Privileges, ' to examine why his name was left out, he having formerly sat as a Peer in that House,' which Committee so appointed reported no other reason than that Sir Edward Walker, Garter, &c. had mentioned a certificate of an under Herald, not duly made or authenticated according to the forms prescribed by the Earl Marshal, so as then or now to have been evidence before the House, by which certificate Earl William was made to have died without issue, ' and because there were two Parliaments in 1640, when Earl Nicholas's name was not in the lists,' although he was in 1640 only ten years old, and could not have been named, as he could not have been summoned. Yet, although the Committee did at the same time report all the proceedings in the year 1661, and amongst them the two Reports of unquestioned Legitimacy, which still waited for confirmation or rejection, and although it does not appear that a word was uttered by any member of the House to bring into doubt or question the justice of such decisions so by their own order again brought before them, yet no judgment was given, nor any proceeding whatsoever directed.

" Because it further appeared by the Journals, that the Earl of Banbury did thereupon, on the 23d of February in the same year, 1669, present another petition to the House, and in the same manner afterwards in 1685, which petitions were as before referred to the Lords' Committees for Privileges, who again brought before the House its own former proceedings, yet still no Judgment was given.

" Because it further appeared by the Journals, that in the year 1692, although the House had thus, for above thirty years together neglected as We conceive, its most manifest duty to the King and to the Claimant, by refusing to come to any decision upon a Claim thus brought before them in a Legal form by the King's authority, and by themselves so often referred to the Lords' Committees for Privileges, according to the ancient forms and customs of Parliament, Yet, that nevertheless when the same case did not call upon the Lords, nor even entitled them (as We shall insist hereafter) to decide upon the claim of Peerage so as to affect the inheritance, but only to grant or to reject the petition of Charles Earl of Banbury, son of Earl Nicholas, then deceased, praying to be tried upon an indictment for murder, as a Peer of the Realm, the House, upon the very same evidence only which it had had before it for above thirty years without coming to any decision, did then resolve, that the said Charles had no right to the title of Earl of Banbury.

" Because, upon all the matters aforesaid, (the said resolution being no bar as We shall protest against hereafter,) the Claimant was entitled to the Judgment of the Committee, unless new evidence had been brought forward, sufficient to controvert a title so supported ; and for this purpose accordingly other circumstances were established not formerly in evidence, but which were not in our opinion commensurate with their object when brought to the standard of Law, which by our own consent had been erected by the Judges.

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" Because, consistently with that standard, they could only be produced to establish a judicial belief and conviction, that William the first Earl of Banbury, had had no access to, or in other words sexual intercourse with his Countess, by which he could have been the father of Earl Nicholas; and for that purpose only the following facts were proved and brought in review by argument before the Committee, viz.:

" That William, the first Earl, was above eighty years of age when Nicholas must have been begotten, and had been married to his Countess for above twenty years, without her having had any children, and that after Earl William's death, she had within a period equally forbidden by decency and custom, married the Lord Vaux, in whose house at Harrowden, Earl Nicholas appeared to have been born.

" But these circumstances, though insisted upon in debate as material to be considered and acted on as evidence, We may altogether put aside before proceeding to others which require far greater consideration.

" Because, with regard to the great age of Earl William, We answer that there is no authority in the Law, nor any instance in any recorded or known trial where the circumstance of age, however advanced, without proof of impotency from its consequences, or from disease or infirmity, has ever been considered by any Judge, or left as a fact to any Jury, as a circumstance to affect Legitimacy; on the contrary, Bracton expressly considers it (and was cited for that purpose before the Committee) as matter which may be legally proved, and then undoubtedly, if believed, it is decisive.

" In the same manner We deny, that the length of time for which a woman may have been barren after marriage, can be legally considered as a circumstance to affect legitimacy, unless it be proved that from infirmity or from age, she was incapable of having children; but We

admit, that the following facts, which were also proved before the Committee, are of an entirely different character, and which We have deeply and duly considered.

" First, That King Charles the First, to induce the House of Lords to consent to an illegal Precedency, conferred upon Earl William by his patent, sent a message to the House whilst considering the question, asking, as the Journal records it: 'That the Earl, being old and childless, might enjoy it during his time;' which message, though before the birth of Nicholas, being subsequent to the birth of Edward the eldest son of Lady Banbury, then an infant nearly a year old, it was argued with great force, that it went strongly to shew, not only that Earl William was at that time considered to be childless, but that from his silent acceptance of the Precedency thus conditionally yielded to him, he so considered himself.

" Secondly, That though possessed of three different estates, which by antecedent settlements were intended to preserve such property in his name and family, he aliened one of them in fee to his Countess, to whom he had given besides the whole of his personal estate; a second to the Earl of Holland, and the third to Sir William Knollys, who in the default of children of the Earl, would have been entitled to have inherited it in the course of descent, and that this last estate so aliened was a royal grant for services, with a reversion in the Crown, and of course not alienable, but which must have descended to Earl Nicholas.

" From these facts it was argued, that it was unreasonable to believe, or rather incredible, that Earl William knew he had issue by his Countess, who were to enjoy after him the honours of his house; and that with regard to the estate so aliened to Sir William [1] Knollys, which was not by Law alienable, it was unreasonable to believe

[1] Sir *Robert* Knollys.

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that Earl Nicholas would not have claimed and enjoyed it, which it was proved he never had.

" Thirdly, That on the death of Earl William, he was found by an Inquisition, *post mortem,* to have died without heirs male of his body, and that certain persons named in it were his heirs. From this fact also it was maintained with great force, that as the Crown had a special interest in such Inquisitions during the existence of the feudal tenures, and as it was manifest that deeds which must have been in the possession of the family had been examined by the jury, it was not reasonably to be believed, but rather incredible, that such an Inquisition could have been found, if the children of the Countess had been visible, and known and received as the children of Earl William, deceased.

" Fourthly, That though there was indeed another Inquisition eight years afterwards, proceeding from due authority as being for property in another county, and which found that Earl William had left Edward his son and heir, yet it was argued that as it found only the small insignificant property of the Bowling Place at Henley in Oxfordshire, such proceeding by Inquisition was by no means necessary, and that, as such property if disputed, might have been recovered in a Court of Law, it ought to be considered as a fraud to support the spurious descent of the children of Lady Banbury, brought forward as it was alleged after her husband's death, by getting rid of the powerful presumption arising from the first Inquisition immediately upon his death.

" Fifthly, That by a deed to which Lord Vaux, Lady Banbury, then his wife after Earl William's death, and Lord Salisbury and Lord Howard, very near relations, were parties, and which were made to settle estates of Lord Vaux's on Earl Nicholas, he was, though styled in the deed Earl of Banbury, described as theretofore known by the name of Nicholas Vaux, from which it was ar-

gued that he had been considered by Lady Banbury herself, and by other near relations, as the son of Lord Vaux and not of Earl William, a presumption strongly fortified, as was contended, by the settlement in question.

" From all these accumulating facts and circumstances it was argued, that there was sufficient evidence before the Committee to establish, not only that Lady Banbury was living in Adultery with Lord Vaux when her children were begotten, but also, and without which the rule given by the Judges could not be satisfied, that Earl William had no sexual intercourse with his Countess by which he could have been the father of her children.

" Lastly, To invest these circumstances with a weight not intrinsically belonging to them, resort was had to arguments of length of time upon all questions of inheritance; but whilst We acknowledge the soundness of the presumptions which the Law has in that respect established, We not only reject them as inapplicable to the present question, but maintain that length of time divest the circumstances above relied on, of all their force and effect.

" Because all presumptions from length of time depend upon a principle which is founded upon the very nature and character of man : viz. That in a country governed by Law, and where impartial Justice is so universally administered, it is to be presumed that every man will enjoy what is his own ; and that they who for a great length of time have not clothed their rights with possession (without being able duly to account for it), either never had such rights, or had for some cause or consideration released or abandoned them. In cases, therefore, where property depends upon conveyances and titles, positive statutes of limitation have been by the Legislature most wisely enacted ; and in cases of incorporeal rights, to which these statutes do not reach, the Judges have by analogy introduced the soundest rules of evi-

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dence, which by degrees have ripened into rules of Law, to protect property and rights against unjust invasion, when time may have destroyed all the means of resistance or defence.

" Because it was therefore with the utmost surprise that in accumulating the circumstances just recited, and indeed throughout the whole debate, We heard it maintained that the Claimant's case ought now to be received with every possible jealousy and caution, because the grave had swallowed up all witnesses who might in other times have opposed it by their testimony; but against this argument, not only in fairness to the Claimant, but for the preservation of the universal and immutable rules of Justice, We solemnly protest.

" If the Claimant indeed had not brought forward his claim when it was first interrupted, if he had not submitted it to the only tribunal which had jurisdiction to decide it, or if that tribunal when appealed to had in the first instance, and while witnesses to the transaction were living given Judgment against him, which, though never confirmed so as to become conclusive, had never been reversed, We should have considered the matter to be nevertheless concluded; but when on the contrary it appears beyond all controversy that the Claimant did bring forward his claim of right at the earliest period, and when it was first interrupted; that that claim was not only twice adjudged in his favour by the Lords' Committees for Privileges, the only tribunal which by the forms and customs of Parliament had jurisdiction to examine it; when the evidence given before that Committee was not only found sufficient by it, but was so admitted by those public servants of the Crown who were appointed to contest his title; when those Judgments of the Committees for Privileges were not only not reversed whilst witnesses were living who might have supported them, but were not impugned by either evi-

dence or argument when repeatedly brought before the House, We protest against the application of length of time as an objection; since we find the Claimant out of possession, not because he had not appealed to a competent tribunal until witnesses were dead who might have opposed his title, but because whilst witnesses were living, the tribunal to which he had appealed, and which was alone competent to the decision, had contrary to all precedent, and to every rule and principle of justice, pertinaciously refused to decide.

"Because if, in 1661, Earl William's great age, the King's message to the House that he was childless, the first Inquisition to the same effect, (even if the second had never existed), the conveyances of all his hereditary property without notice of his children, the non-claim of Earl Nicholas, and the settlement upon him by Lord Vaux, describing him as some time or other bearing the name of his family; if all these circumstances had been urged against him at that period, We might admit, without danger to the argument, that they might have been thought sufficient to repel the presumption of legitimacy, until sufficiently contradicted or explained by the Claimant, or until intercourse between Earl William and his Countess had been proved as a fact, after the legal presumption of the fact had been overthrown, when the case was quite recent, and the character of such circumstances must have been capable of scrutiny and explanation, with the utmost certainty and truth, it might fairly be considered that both Law and Reason would require them to be explained; but We contend that both Reason and Law must equally pronounce, that when time has rendered all proof impossible, it is sufficient that they are capable of explanation, since by facts they can no longer be explained.

"As to the King's message, he is now entitled to say,

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that Earl William to maintain an untenable Precedency which would have been lost to him, even for his life, if the birth of Earl Edward then only an infant, had been made public, he might for that reason, however dishonourably, have concealed Edward and afterwards Nicholas during his life, which would terminate the motive; and that such concealment led to the first Inquisition, corrected by the second, when the cause of the concealment was at an end; and that as both the Inquisitions were equally supported by the oaths of witnesses, fraud at such a distance of time cannot justly be presumed. As to the conveyances, he is entitled to say, at this distant period, that Earl William might have been pressed by incumbrances to alienate all his property, but which cannot now by any possibility be investigated; or that, though he had had access to his Countess, he might have believed or suspected her commerce with Lord Vaux, and that his mind was thus aliened from his children; and as to the non-claim of the unalienable estate, he is fully entitled now to answer that the very objectors to his title make it the strength of their argument against it, that no opposition could in former times have been raised to it in the courts, whose judgments depended as now, upon the ultimate decision of the House of Lords, before which Court he repeatedly brought the claim of the Earldom, which he held by the very same title as the estate.

" Because We have already said, and We repeat, that the force and value of these explanations cannot now be put in the scale against the presumptions to which they are opposed. It is enough that they are possible, consistently with the facts on which the contrary presumptions are erected; since length of time, so unjustly objected against the Claimant, has rendered it impossible to arrive by legal testimony at the facts.

" Because in whatever manner these explanations

ought to be received when opposed to the circumstances from whence the adverse presumptions have been derived, it cannot possibly be denied, that all the circumstances so accumulated, or any circumstances whatsoever, would be laid prostrate before the proof of actual access; from which proof, by length of time, the Claimant is also utterly cut off.

"The circumstances relied on, even unexplained, could raise no other presumption than that of concealment; a presumption besides against the evidence in 1661, since the witnesses denied that they knew of Earl Nicholas being concealed or any cause of concealment, in which they might have been contradicted by hosts of living witnesses, if their testimony had been false.

"Because concealment, even if it could now be justly presumed from circumstances against the proof at the original period, when it ought to have been established, could only repel the primary presumption of access, and could by no rule of Law prevail against the fact of actual access; such a doctrine was never held nor even attributed to Lord Hale, nor to any other Judge; and although Earl Nicholas's counsel were not called upon, in 1661 to prove it before the Committee, yet as far as the evidence extended, access rather than the contrary ought now to be collected from it; since it was sworn by Mary Ogden, and not contradicted, that Earl William visited Lady Banbury. She said, 'I know not whether Earl William knew that his Countess lay in, but he visited her;' and to another question, she answered, 'that the child was carried ordinarily up and down the house.' Surely these answers (giving credit to the witness for honesty), which cannot now be disputed, their meaning not being changed by further examination, must be taken to have meant such visits from which the witness supposed he might have known of the delivery, though

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she could not swear that he did; and if he might have known of the delivery, he might have seen the child, which was carried publicly about the house.

" Because such evidence by living witnesses accepted for any reason as sufficient in 1661, We protest against the accumulation of the circumstances relied on at the distance of a century and a half, to raise the presumption even of concealment, much less of non-access, when the Claimant, from no laches of his own, but by the acts of the very Court which has now rejected his title, has been prevented from the possibility of proving the fact, which, it is admitted, if proved, would totally destroy the force and effect.

" Because the resolution of the House of the 17th March 1692, [1693] That the petitioner, Charles Knollys, who was the son and heir of the said Nicholas, had no right to the title of Earl of Banbury, was not a conclusive bar to the present Claimant, inasmuch as it was not a claim to the inheritance of the Peerage, brought forward by petition to the King, and referred by his Majesty to the House of Lords, according to the ancient forms and customs of Parliament, but a petition only, by a person who considered himself as a Peer, to be tried as such upon an indictment for murder then depending against him, the rejection of which, though it might be conclusive against him personally as to the prayer of such petition, could not affect the succession so as to conclude his posterity.

" Because there is no precedent upon record of any claim of Peerage having ever been decided except upon petition to the Crown, referred to the House of Peers, according to the ancient customs and forms of Parliament, and because the Law of the land, which is the birthright of the subject and which cannot be over-ruled by any

privilege of the Lords when not duly exercised, gave judgment against that resolution of the House. We do not question that it is the privilege of the House to decide conclusively upon claims of Peerage; We only contend that this privilege ought to be exercised according to the forms and customs of Parliament, and that the Crown, which is the fountain of that high dignity, has a constitutional claim that the forms and customs of Parliament should be preserved in the decisions of the Peers.

" Because the judgment of the Court of King's Bench, if erroneous, might have been reversed upon writ of error by the Lords themselves, the authority of whose resolution had been questioned by it; but although the House, in the same temper which had unhappily characterized all its proceedings (at least as we view them) upon the same subject, irregularly questioned at its bar the Lord Chief Justice Holt and his brethren, concerning the reasons of their decision, it received no other answer from those truly great and eminent Judges, than that their judgment was only open to be corrected by the forms of the Law; and it stands at their day uncorrected and unreversed.

" Because the Lords, by their own authority, or by address to his Majesty, might have directed the Attorney-general to bring the judgment before them for reversal, as unduly bringing their resolutio into question.

" Because, if the resolution of the House in 1692 [1693] ought not to be held conclusive against the inheritance of this Peerage, it follows, that it never could become so by the resolution of 1697, which amounted to nothing more than that the House put that conclusive construction upon its own former proceedings; but if the Lords had no jurisdiction by the Law of the land to come to the

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first resolution, the second, which was only to declare its construction, must, of course fall to the ground. We acknowledge, and will assert as Peers, the authority and conclusive character of all judgments of the House upon such a question, duly entertained; but for that very reason we feel ourselves bound upon our Honours to be the more jealous to confine them within the rules of Law.

" Because the resolutions in question, of **1692** [**1693**] and **1697**, were not considered as a conclusive bar to the Claimant, either by the House in its preliminary proceedings, or by the Committee in the debates leading to its final Report. The late Attorney-general, by his learned Report to the King, not having considered the claim to be concluded, and his Majesty having referred the matter according to the forms and customs of Parliament, the House instead of making to his Majesty a similar communication to that made to King William in **1697**, referred the petition of the Claimant to the Lords' Committees for Privileges, heard his counsel and witnesses without even hinting any obstacle to a judgment according to the result of the evidence; and because even in the final debates, the resolutions were not much insisted upon as conclusive, if they could be shown to be manifestly erroneous.

" Because We agree to that mode of considering the resolutions, and found our Dissent upon manifest error; and protest against the judgments of the House, for the reasons which we have recorded, at such unusual length; because an unreasoned Dissent would have thrown no light upon the grounds of a decision of vital importance in its consequences to the inheritance of the Peerage; and because it would have been unworthy to have discussed it partially, so as to bring into discredit the justice of the

House, whose decisions it is our duty to reverence and support.

(signed) Erskine.
Edward.
William Frederick.
Augustus Frederick.

Nelson.
Ashburton.
Ponsonby.
Hastings, &c.
Hood of Catherington.
Dundas.

Note to the Case of the Earldom of Banbury.

NOTE.

CASES OF CONTRARY FINDINGS OF HEIRS IN INQUISITIONES POST MORTEM.

[*Referred to in pp.* 362. 510, *antea.*]

" Esch. Edw. III. No. 37. Thomas De la Bere complained to the King, that his father, Richard De la Bere, had levied a fine of the moiety of the manor of Haselbere, co. Somerset, settling it upon himself and Clarissa his wife, with remainder to their several sons, and that he, Thomas, had succeeded to the possession under that fine. But the King's escheator for Somerset had lately, under an inquisition taken virtute officii, seized the same into the King's hands, whereupon he prays restitution. The King orders Thomas Cary, the escheator, to inquire and certify the cause of seizure. Cary answers, that he found by inquiry, virtute officii, that King Edward the First was seised of the manor of Haselbere, which he gave to one Alan Plokenet and his heirs; that Alan was a foreigner and a bastard, and had lawful issue, Alan and Joan. Alan the son succeeded, and married one Sibella (who is still living his widow), and that he died without issue. Joan succeeded, and was seised of the said moiety, but she also died without issue; whereby it plainly appeared that the said moiety was an escheat to the King, because the said Alan, the father, was a bastard, and both his son and daughter were dead without issue.

" Thomas De la Bere replies, that Alan was neither a foreigner nor a bastard, but that he was born at Thornton, co. Dorset, of Andrew De la Bere and Alicia his wife, sister of Robert Walrond: *Anglicanæ nationis in legitimis matrimoniis procreatus.* Henry de Graystock, for the King, asserts the alienage and bastardy, and a day is appointed. *Another inquisition* is taken before the sheriff of Somerset, wherein it is found that Alan was the son of the said Andrew and Alice, ancestors of the said Thomas De la Bere, who is the heir, and thereupon a writ of ouster le main et non introm. issues to the sheriff.

" *See* Fine Roll of 39 Edw. III. m. 6, in the Tower of London. William de Kerdeston, a Peer of Parliament, died 14th Oct. 35 Edw. III. An inquisition taken at Norwich the same year, and another at York the year following, agree in finding that John de Burghersh, Knight, son of Maud, daughter of the said William, was next heir of the said William."

" In the 39 Edw. III., an inquisition taken at Woodbridge in Suffolk, finds that the deceased held the manor of Stratford, in that county, of William de Ufford, and that the said John de Burghersh was his cousin and heir, and nineteen years old. Here was a case of minority, and consequently of wardship; but the wardship, as far as this inquisition went, did not belong to the King, because the manor of Stratford was not held of the King, but of Ufford. The inquisition, however, goes on to state, that it appearing by writs out of

the Exchequer, that the deceased held lands of the King in other counties, which took the wardship out of private hands and cast it upon the Crown, the escheator had therefore seized upon the manor of Stratford, in the King's name.

"Thus far the heirship appears to remain with Burghersh. But in the 44 Edw. III., subsequent inquisitions taken at Norwich and Beceles, find, that one William de Kerdeston was son and heir of the deceased, and thirty-five years old. And under these latter inquisitions, Kerdeston recovered possession against Burghersh, and kept it till 29 Hen. VI.—*eighty years*, when Kerdeston was ejected by William De la Pole, Duke of Suffolk, and Alice, his wife, as appears by an inquisition taken at Ipswich after the death of Sir Thomas de Kerdeston, grandson of that William who had been found heir in 44 Edw. III. In this inquisition the jury say, that Sir William de Kerdeston, knt., who died 35 Edw. III., was married to one Margaret Bacon, at Bulcamp in Suffolk, by whom he had two daughters, named Maud and Margaret, born in lawful wedlock, in the said town of Bulcamp; that afterwards the said William—"concubuit cum quadam muliere vocata Alicia Norwich, et de ea suscitavit et procreavit quemdam Willielmum *bastardum* genitum et ratum extra aliquod matrimonium inter eosdem Willielmum de Kerdeston mil. et Aliciam habitum seu solempnizatum." That the said William the bastard had issue Sir Thomas de Kerdeston, then late deceased, which Sir Thomas was an intruder, &c. Esc. 29 Hen. VI. No. 31, in the Tower."

"In the Clause Roll, an. 50 Edw. III. part 1, memb. 5, it is recorded, that by an inquisition formerly taken, viz. in an. 47 (see Esc. 47 Edw. III. No. 34), it had been found that Margaret, the widow of Hamon Lestrange, of Cheswardine, co. Salop, held the manor of Strange Betton, in that county, for her life, with reversion to the right heir of the said Hamon, and that John Lestrange, son of John Lestrange, jun., cousin of the said Hamon, was next heir of the said Hamon, and was nineteen years old on the 1st day of August in that year; and that by a subsequent inquisition in the 49th (*vid.* Esc. 49 Edw. III. p. 2, No. 7), it was found that she held the said manor jointly with her said husband, to them and the heirs of their bodies, and in default of such issue, remainder to Fulk Lestrange, brother to the said Hamon, and the heirs of his body. That the said Hamon and Margaret died without issue, and the said manor ought to descend and go to Joan, wife of John Caroles, and Eleanor, wife of Edward de Acton, as daughters and heirs of the said Fulk, and that both Joan and Eleanor were of full age. Upon this second inquisition, the said Joan and Eleanor, and their respective husbands, claimed the manor, which was then in the King's hands, by reason of the minority of that John Lestrange, who had been found heir in the first inquisition, and they prayed a writ of ouster le main; whereupon the King ordered the sheriff to give notice to the executors of Richard, late Earl of Arundel, to whom the custody of John's lands had been granted during his minority, to appear and show cause, in Chancery, why the said writ of ouster should not be granted. The Earl of Arundel, one of the executors of his father's will, appeared accordingly, but alleged nothing, neither could the King's serjeants, and therefore the writ of ouster was granted.

Note to the Case of the Earldom of Banbury.

The whole of this case is stated upon the Clause Roll of 50 Edw. III.' which is a public record remaining in the Tower of London, and fully explains what was the regular effect of a subsequent inquisition when it contradicted a preceding one."

" Richard de St. Maur, a baron who had been summoned to Parliament from 2 to 8 Hen. IV., died in the 10 Hen. IV. His death happened in the feast of Epiphany, and an inquisition post mortem was taken on Thursday next after the feast of the Purification following, that is in the month of February, and within six weeks of the time of the death. The jurors say, that he died without heirs of his body, and that John, his brother, is his next heir. *See* Escheat, an. 10 Hen. IV., in the Tower.

" In the year following the mother of this Richard died, and an inquisitio post mortem was also taken an. 11 Hen. IV., in which the jury found, that Alice, the daughter of that Richard, who in the preceding inquisition was found to have died without issue, was the grand-daughter and heir of the then deceased. *See* Escheat, an. 11 Hen. IV., in the Tower.

" Another inquisition, taken in an. 2 Hen. VI., confirms this latter one, and fully explains both; for the jurors there say, that the said Richard died in the feast of Epiphany, an. 10 Hen. IV. Mary, his wife, " ad tunc per ipsum existente impregnata;" that the said Mary was afterwards, on the 23rd of July following, delivered of a daughter named Alice, which Alice is heir of the said Richard and wife of William Lord Zouche, and was fourteen years old (*i. e.* of full age) on the 23rd of July preceding the date of the inquisition. Escheat, an. 2 Hen. VI. No. 10." Mr. Townshend's MSS.

These extracts were made for Lord Erskine's use on this occasion, and are printed in the Appendix to Le Marchant's *Report of the Claim to the Barony of Gardner.*

See also similar variations in Inquisitiones Post Mortem in *Cornwall's* case, p. 66, antea; and numerous other instances exist.

APPENDIX.

CASES

OF

FOXCROFT, DEL HEITH, AND RADWELL,

TEMP. EDW. I.

FOXCROFT'S CASE.

10 Edw. I.—From Rolle's Abridgment, 359.

[*Referred to in p.* 30.]

Foxcroft's case. 10 Edw. I.

P. 10, E. I. B. Rot. 23. Foxcroft's Case.—" Un R. " esteant infirmus et en son lect fuit marrie al A. un feme " per levesque de Londres, privatment en nul esglise ou " chappel nec ove celebration d'ascun Masse, le dit A. " esteant adonque pregnant del dit R. et puis deins 12 " semains puis le marriage le dit A fuit deliver de un " fitz, et adjudge un bastard, et issinst le terre eschete " al seigneur per mort R. sans heir."

As this case has been frequently cited, from its being the earliest report of a case after Bracton wrote, it is of considerable importance; more especially as it appears to have been *completely mistaken* by the high authorities who have alluded to it.

In the *King* v. *Luffe*[1], Lord Ellenborough, Chief Justice, observed, " There is a very early case, of *Fox-* " *croft*, in the time of Edward the First, where an infirm " bed-ridden man was privately married to a woman who, " within twelve weeks after, was delivered of a son; and " the issue was adjudged a bastard. The principle to " be deduced from the cases" [his Lordship had alluded to the *Queen* v. *Murray*, the *King* v. *Reading*, and to *Foxcroft*'s case] " is, that if the husband could not by " possibility be the father, that is sufficient to repel the " legal presumption of the child's legitimacy; but if the " mere fact of access of the husband at any time be- " tween the moments of conception and delivery would " make the child legitimate, it would have been an answer

[1] 8 *East*, 193-212. *Vide* p. 161-177, antea.

Foxcroft's case.

" to many of the cases where legitimacy has been in ques-
" tion[1]."—Again: " But *Foxcroft*'s case, which I before
" mentioned, was the case of an infirm bed-ridden man,
" who having married in that state twelve weeks before
" the delivery of his wife, that was holden to bastardize
" the issue, though the parties were together; and no
" doubt is thrown on the principle of that case in any
" subsequent authority, nor even in the learned editor's
" notes in Co. Litt. 244[a], 123[b], &c. This, therefore, is
" another instance of the exception of the general rule,
" admitted at so early a period as the 10th Edw. I., and
" founded on natural impossibility arising from bodily
" infirmity[2]."

Mr. East in his Report of the *King* v. *Luffe*, has added this remark on the *Foxcroft* case:

" It is to be observed, however, that as the case is
" stated in Rolle, R., the infirm bed-ridden man, *was*
" *married to A.* by the Bishop of *London*, privately *in*
" *no church or chapel, nor with the celebration of any*
" *mass*; ' le dit A. esteant adonque *pregnant del dit R.*
" &c.' Now if by the word *del*, it be meant that A. was
" pregnant *by* the man whom she afterwards married,
" (and the words are so construed in other abridge-
" ments); assuming that there was a marriage, the case
" is scarcely intelligible; for it is contrary to the
" whole current of decisions to say that a child *born*
" *after* the marriage of its actual *parents*, if *begotten be-*
" *fore*, is a bastard; and if R. were in truth the father
" of the child, begotten some time before, it was a matter
" of no consequence how infirm of body he was at the
" time of his marriage, only twelve weeks before the
" birth; and yet stress is evidently laid upon this cir-
" cumstance in the statement of the case. But if, by

[1] pp. 166, 167, antea. [2] p. 170, antea.

Foxcroft's case.

" the mention of the privacy of the marriage, and that " it was in no church, &c., it were meant to question its " validity for want of a proper ceremonial, the infirmity " of the man's body at the time was equally immaterial, " and the case itself not worth noticing; as amounting " only to this, that the issue of persons not married " according to the requisite ceremonies of the law, or, in " other words, not married at all, are bastards. And if " Lord Rolle had considered that to be the point in " judgment, it is singular that he should not have drawn " exclusive attention to it by some more appropriate " turn of expression, than by saying that R. was mar- " ried privately, &c. in conjunction with the other cir- " cumstances of the case. Quære then, whether there " may not be some error of the pen or of the press? " For though the relative word *dit*, supports the allusion " to the husband R.; there being but one R. before men- " tioned, yet in abstracting the record, as it is likely " enough that the son was of the same name with the " supposed father, this error may have crept in without " attracting attention. The word *del* properly signifies " *of*, and *pregnant del*, &c. is *pregnant of*, &c., and not " *by*, &c.; and Lord Rolle, in other places under the " same head, speaking of pregnancy, in relation to the " husband or father, uses the phrases 'enseint *per* A.' " 'ad issue *per* luy,' 'ad issue *per* B.,' while the word " *del* is plainly used in its common sense for *of*, in se- " veral sentences immediately preceding. And in this " sense only, speaking of the woman as *pregnant of R.* " *the issue*, is the case intelligible, or likely to have been " noted in that place or manner: in which sense Lord " Ellenborough seems to have read the case. There is " no regular Year-Book of this period to refer to, but only " a few scattered notes, not including this case[1]."

[1] 8 *East*, 199, 200, note.

Foxcroft's case.

During the claim to the Earldom of Banbury in 1813, Lord Ellenborough again alluded to the *Foxcroft* case in these words:

" In the reign of Edward the First a child was de-
" clared illegitimate, notwithstanding the coverture and
" cohabitation of its mother and ostensible father[1]."
" The presumption of real issue was always open to
" discussion."

Lord Eldon said, on the same occasion:

" *Foxcroft*'s case (10 Edw. 1) shows that it was not
" the partial or permanent impotency of the husband,
" but the impossibility of his being the father, which was
" the subject of consideration. In that instance he was
" an old bed-ridden man, and the child was born twelve
" weeks after marriage. It was held illegitimate[2]."

The importance of this case induced Mr. Le Marchant (in his able introduction to the Report of the Claim to the Barony of Gardner) to pay considerable attention to it; and he thus endeavoured to reconcile the words of the report in Rolle with the construction given to it by Lords Ellenborough and Eldon:

" The principles of Adulterine Bastardy thus laid down
" by Bracton, Britton, and Fleta, must stand exclusively
" on the authority of those writers, for no reports of the
" legal decisions during the period in which they lived
" have come down to us. The earliest case on the sub-
" ject was decided five years after the death of Britton.
" An infirm bed-ridden man was married privately, out
" of church, and without the celebration of any mass, to
" a woman, in such an advanced state of pregnancy that
" she was delivered of a child twelve weeks afterwards.
" The child was adjudged a bastard. The verdict must
" not be ascribed exclusively to the husband's physical

[1] Antea, p. 489. [2] *Ibid.* p. 521.

" inability, for it would then have been unnecessary to have noticed the wife's pregnancy at the date of the marriage, and the clandestine nature of that ceremony, both of which circumstances are dwelt upon with a minuteness that marks their importance. The facts of the case furnished ample grounds for presuming a conspiracy, and thus constituted the strongest moral evidence that the child was illegitimate."

Foxcroft's case.

To the above passage Mr. Marchant has added the following note:

" This case was cited by Lord Ellenborough in the *King* v. *Luffe*, 8 East, 299, as establishing, 'that where the husband could not by any possibility be the father, that is sufficient to repel the legal presumption of the child's legitimacy.' Mr. Starkie (Treatise on Evidence, ii. 219) is at some loss how to arrive at this conclusion. The case confines the inability of the father to the date of the marriage, and he *presumes* it must have existed at the date of the conception. Allowing this presumption to be correct, why should the privacy of the marriage have been introduced? Mr. East, in his elaborate note on the *King* v. *Luffe*, does not remove the difficulty; and indeed the case can only be made intelligible by adopting the construction in the text, that the clandestine marriage, the infirm state of the husband at the time of the marriage, and the birth of the child so soon after marriage, created a presumption against the legitimacy of the child, strong enough to overcome the legal presumption in favour of its legitimacy. If the cause were tried by our Law, as it now stands, it can hardly be doubted that a Judge would direct a Jury to take all these circumstances into their consideration, and without resorting to the presumption of the husband's inability at the date of the wife's conception, a jury might be justified in

Foxcroft's case.

" treating these circumstances as conclusive against the " legitimacy. I need scarcely observe, that the sacra- " mental sanctity attached to marriage by the Catholic " church made the unusual mode of its celebration in " this instance additionally suspicious[1]."

Notwithstanding the high authorities which have been cited, and the learning which has been brought to the elucidation of *Foxcroft*'s case, it is submitted that it has been *entirely misunderstood,* and that the question which arose as to the legitimacy of the child born twelve weeks after the marriage, depended *solely* upon the *validity* of the *marriage* itself, and not upon *any doubt* whether the infant was *begotten* by the *husband.*

As this view of the subject will be supported by proofs, it is scarcely necessary to observe that there is nothing in the report of the case by Lord Rolle which justifies the opinion that R., the husband, was an *old* man, or that he was, as Lord Ellenborough and Lord Eldon seem to have considered him, *permanently* infirm or bedridden. All which can be inferred from the report is, that at the time of his marriage he was confined to his bed by serious illness, an event equally incidental to a *young* and to an *old* man ; the words of the original being, " Un R. esteant *infirmus* et *en son lit.*" The doubt expressed by Mr. East as to the meaning of the words " le dit A. esteant adonque pregnant *del* dit R.," does not seem to be well founded. *Del,* no doubt generally means *of,* but it also means " *by* ;" and if its usual interpretation, viz. " *of,*" be given to it in this instance, the difficulty is not removed ; for there is as much obscurity in saying " a woman is pregnant *of,*" instead of " *with* a son," as in saying that she is " pregnant *of,*" instead of " *by*

[1] pp. xlix, l.

a particular man." Mr. East justly remarks, that the relative words to "*del*" are "*dit* R.," but no *other* R. is mentioned in the report than the husband; and in the next line, where the woman's delivery is mentioned, she is said to have been "delivered of a son, and [it was] adjudged a bastard." Foxcroft's case.

The word "*de*" is frequently used in the same sense by Britton, and in the Year Books: for example,—"Ascunes foitz avient, que femmes tenauntes de la mort lour barons, se feynent estre enceyntes *de* lour barons," &c.—"Soit enquys de luy si ele soit enceynte, et *de* qui et si el die *de* son baron que morust," &c.—"Enfaunt estre engendre *de* autre que *del* baron," &c.—"Engendre *de* luy un enfaunt."—(*Britton, vide* pp. 20. 22, antea). "I prist a feme m̃ cest K. apres quel temps el' relinquist s̃ bar̃ et demurrast ovesq̃ un Francis Suyliard, le quel F. engend' *de luy* (tantcome el' fuit en avowtre) m̃ cely q̃ est ore tenãt."—(*Y. B.* 39th Edw. III., 14.)

The literal translation of the report of *Foxcroft*'s case seems therefore to be this: "One R. being sick, and in bed, was married to A., a woman, by the Bishop of London privately, in no church or chapel, nor with the celebration of any mass, the said A. being then pregnant by the said R., and then, within twelve weeks after the marriage, the said A. was delivered of a son, and adjudged a bastard; and thus the land escheated to the Lord by the death of R. without an heir."

The facts of the case are presumed to have been, that R. cohabited with A., and was pregnant by him, when he was taken dangerously ill. Compunctions of conscience, induced probably by his situation, and the suggestions of his religious adviser, made him resolve to atone for his sins, and repair the injury which he had done to his paramour, by marrying her; but being unable to go to church, or to be removed from his bed, the ceremony

Foxcroft's case.

necessarily took place whilst he was " in his bed ;" and such were the facts of a similar case, about twenty-four years afterwards, which throws much light on this question[1].

It is necessary to inquire whether such a marriage as that which took place between R. and A. was *legal*, and whether the issue born after it was celebrated would be legitimate? According to the Ecclesiastical Law a marriage of that nature would be valid, but it appears that a marriage solemnized under such circumstances was *not* legal by the *Common* Law; that it would *not* legitimize the issue born afterwards ; that the only object of such marriages was to satisfy the consciences of dying men; and that they took place solely by the advice of their ghostly advisers, who, of course, deemed a marriage which was sanctioned by the Church, amply sufficient for all *spiritual* purposes.

This view of the subject, would render the report, as it stands in Rolle, perfectly intelligible, and would prove, not only that the deductions which were drawn from it in the *King* v. *Luffe*, and in the *Banbury* case, were not warranted by the premises, but that the *Foxcroft* case derived the importance which caused it to be reported solely from its establishing that *a marriage under the circumstances described*, was not *valid* by the *Common* Law of England.

The following passages from Bracton and Britton, when treating on Dower, prove that private marriages did not render the issue capable of inheriting :

" Quando? Et sciendum, quôd ante disponsationem in initio contractus. Ubi? et sciendum quòd in facie Ecclesiæ, et ad ostium Ecclesiæ, *non* enim valet constitutio facta in *lecto mortali*[2], *vel in camera, vel alibi*, ubi

[1] *Vide* p. 567, postea.

[2] The cases of *Del Heith* and *Foxcroft*, and the case in *Y. B.* 44th Edw. III. 12. 28, which show the practice of men marrying their concubines on

clandestina fuerint conjugia quiá si non valeant clandestina conjugia heredibus quoad successionem nunquam valebunt uxoribus ad dotis exactionem[1]."

Foxcroft's case.

Britton says, in the Chapter on Dower:

" Dower est ceo que fraunk home done a sa feme espouse al huys d' mouster pur la charge de matrimoyne, & p̃ le mariage aver à la sustenaũce la femme & à la nurture des enfaũtz a engendrer, si la feme survive le baron. Dower ne fait mye assigner en toutz lieux ne en totes houres, mes en certeynes, sicõe en comẽcem̃t des contractes, & soulem̃t al huys d' mouster en solempnete de temoynes, & nemy en musettes. *Car sicome prives esposailles faitz en muscettes sount p̃judiciels en succession quãt as heires, ausi soũt eur p̃judicielz as femmes quãt a lour dowers recovrer.*[2]"

In the Chapter " De Excepcion de Concubinage," he says:

" Mes ore purra ascũ aꝟ demaũd que *si vn home teigne un amye en concubine & engendre d' luy un enfaunt, & puis la espouse privem̃t aillours que al huys d' mouster, & puis en tielx esposailles privem̃t engendre d' luy un enfaunt, & puis lespouse solempnem̃t al huys de mouster, & illonques la dowe, & puis engendre de luy un autre enfaunt, quel enfaunt sera receyvable à la succession del heritage l'piere,* & p reson de quel enfaunt doit la fẽme estre dowe aps l' deces s̃ piere: En tiel cas fait a respondre, q̃ l' mulveyn fitz doit c̃e resceu, à la succession del heritage s̃ piere, & s̃ra counte pur muillere, tout fussẽt l's esposailles prives, quant en droit de sa nacion, mes que il pusse aver que il fuit nées dedens esposailles, l'quel l's esposailles fuerent faits solempnem̃t ou privem̃t. Et si ne avera mye

their *death beds,* prove the absurdity of the suggestion that " *lecto mortali*" in this passage should be read " lecto *maritali.*" *Vide* Hargrave's *Co. Litt.* 123.

[1] *Bracton*, lib. ii. cap. 39 f. 92. & 302 b. *See* also *Co. Litt.* 1 Inst. 34 a; and Fitzherbert's *Natura Brevium*, ed. 1794, vol. II. p. 150.

[2] Cap. 101, p. 246 b.

Foxcroft's case

la mere dower par reson d' cel enfaunt, eins avera par reson d'l tierce enfaunt, & par l's solēpnes esposailles, ou ele fuit dowes al huys d' mouster. Et issi piert & veiers est q̃ la mere ne avera ascune foits point d' dower, tout soit son fits receyvable à la successiō d' l'heritage son piere, & q̃ jāmes ne acrest accion a nul dower demaunder, si l'establissem̄t ne luy eyt este fait al huys d' mouster l' q̃l q̃ ceo soit en temps d' ētredit, ou en autr̃[1]."

The Law, as it is thus laid down by Bracton and Britton, respecting clandestine marriages, is illustrated by the case of *Del Heith,* which occurred in the 34th Edw. I., which has hitherto escaped attention, and many of the facts of which are very similar to *Foxcroft*'s case.

[1] Cap. 107, p. 253.

CASE OF DEL HEITH.

Harleian MS. 2117. fol. 339.—[*Referred to* p. 31, antea.]

Case of Del Heith.

"Termino Paschæ, 34 E. 1, rot. 203. Johannes del Heith frater Petri del Heith habuit terras in Thorp Episcopi juxta Norwici et tenuit quendam Katherinam in concubinam, de qua procreavit quendam filium nomine Edmundum, et quendam filiam nomine Beatricem; et postea quadam infirmitate languebat, inde in periculo mortis extiterat, ita quod, *quidam vicarius de Plumstede ei pro salute anime sue consuluit ut predictam Katherinam duceret in uxorem*, qui quidam Johannes occasione infirmitatis predicte omnino impotens tamen bone memorie existens, *in domo ipsius Johannis* coram vicario, predictam Katherinam spontanea voluntate sua affidavit, et annulum digito Katherine apposuit et verba consueta ad matrimonium contrahendum *absque missæ celebratione pronuntiavit* eo quod propter debilitatem ad ecclesiam accedere not potuit: et ipsam extunc ad totam vitam ipsius Katherine pro uxore tenuit; et postea procreavit filium nomine Willielmum ex ipsa Katherina. Nota quod post decessum predicti Johannis qui obiit sersitus de predictis terris in Thorp Episcopi in dominico suo ut de feodo, predictus Petrus frater predicti Johannis intravit in eisdem tenementis clamando se esse filium (fratrem) et heredem propinquiorem predicti Johannis et predictus Willielmus infra etatem existens, clamans se esse filium et heredem ipsius Johannis predictum Petrum de predictis tenementis ejecit. Et quesitum fuit si *aliqua sponsalia in facie ecclesiæ inter eos celebrata fuerunt post-*

Case of Del Heith.

quam predictus Johannes convaluit de predicta infirmitate. Dicunt quod *non.* Et quia convictum est per assisam istam quod predictus Johannes del Heith *nunquam disponsavit predictam Katherinam in facie ecclesiæ per quod sequitur quod predictus Willielmus filius Johannis nihil juris clamare potest in predictis tenementis* sed in misericordia pro falso clamore." fol. 224, Norff.

RADWELL'S CASE.

From Rolle's Abridgment, 356,—[*Referred to* p. 32.]

Radwell's case.

"18 E. 1, Rot. 13 in B. R. ove Mr. Bradshawe, Johannes de Radewell port assise vers Radulfum & Henricum coram Johanne de Vallibus Willielmo de Malam & sociis suis itinerantibus apud Bedfordiam cest assise fuit port la 15 E. 1. & puis in 18 E. 1. les parties & recognitors del assise vient coram rege, & l'assise trove inter alia: Que puis le mort de Robert le Baron de Beatrice mere del dit Henry, le dit Beatrice vient en le court del dit Radulf de que le terre est tenus per service de Chivalrie, & predicta Beatrix presens in curia quæsita an esset pregnans necne, juramento asserebat se non esse pregnantem, & ut hoc ommibus manifeste liqueret, vestes suas usque ad tunicam exuebat, & in plena curia sic se videri permisit, & dicunt quod per aspectum corporis non apparebat esse tunc pregnans Sur quel evidence le dit Radulfe le seigneur prist le dit John pur heir, &c. Et quia invenitur per veredictum juratorum assisæ captæ coram præfatis Justiciariis itinerantibus, quod prædictus Henricus natus fuit per undecim dies post ultimum tempus legitimum mulieribus pariendi constitutum, ita quod prædictus Henricus dici non debet filius prædicti Roberti secundum legem & consuetudinem Angliæ usitatas, imo dici debet secundi viri prædictæ Beatricis si forte se nupserit alicui infra undecim dies post mortem primi mariti sui ut si extra matrimonium Bastardus, & quia per veredictum Juratorum invenitur quod prædictus Robertus non habuit accessum ad prædictam Beatricem per unum mensem ante mortem suam, per quod magis præsumitur contra prædictum Henricum, & plane invenitur in Recordo,

Radwell's case.

quod prædictus Johannes stetit in seisina ut frater & hæres prædicti Roberti per unum annum & amplius, & per voluntatem & assensum prædicti Radulphi capitalis domini, &c. Consideratum est quod prædictus Johannes recuparet seisinam suam de prædictis tenementis per visum Juratorum, & prædicti Radulphus & Henricus in misericordia. Vide 8 E. 2. quod vide Rotulo Parliamenti, 6 E. 3. membrana, 4.

(" Nota que le Jurie trove que le Baron languish de un fever longe devant son mort.")

This case is thus stated in the " Placitorum in Domo Capitulari Abbreviatio", p. 221, Trin. 18 Edw. I.:—

" Breve de cert̃ thesauř & camerař Joħes de Radewell queř & Henř fił Beatricis que fuit uxr Roƀti de Radewell & ał deff' de uno mess lx acř terre viii acř prati xx soł redd & uno molend excepta tercia parte in Radewell, &c. que tenentur de Rado de Pyrot p servicium militare Ideo considerat̃ est qd predict̃ Joħes recupet seisiñ suam de predict̃ teñ & Radus & Henr⁹ in mĩa In quo recordo sic continetur Et quia invenitur p veredictu juř assise capte coram justic̃ itinerantibȝ qd predict̃ Henr⁹ natus fuit p xi dies post ultimum tempus legittimum mulieribȝ pariendi constitutum ita qd predict̃ Henr⁹ dici non debet fił predicti Roƀti secundum legem & consuetud Angł constitutum, &c. (Ex latere ejusdem recordi continetur ut sequitur Istum recordum inveniri potest alibi in Rotlo Sc̃i Michis anno regni Reg̃ nunc xxii p defectu pgameñ), Rot. 13."

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